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REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

N. Y.

Supreme Court of Judicature,

AND IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS

AND

THE CORRECTION OF ERRORS,

IN THE

STATE OF NEW-YORK.

BY WILLIAM JOHNSON,

COUNSELLOR AT LAW.

VOL. XV.

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1867.

J U D G E S
OF
THE SUPREME COURT OF JUDICATURE
OF
THE STATE OF NEW-YORK,
DURING THE TIME OF
THE FIFTEENTH VOLUME OF THESE REPORTS.

SMITH THOMPSON, Esq., Chief Justice.
AMBROSE SPENCER, Esq.
WILLIAM W. VAN NESS, Esq.
JOSEPH C. YATES, Esq.
JONAS PLATT, Esq.

Attorney-General.

MARTIN VAN BUREN, Esq.

SOUTHERN DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the sixth day of March, in the forty-third year of the Independence of the United States of America, **WILLIAM JOHNSON**, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit :

“ Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. XV.”

In conformity to the act of Congress of the United States, entitled, “An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;” and also to an act, entitled, “An Act supplementary to an act, entitled, An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.”

JAMES DILL,
Clerk of the Southern District of New-York.

JUNE 11. 1929

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7/2/41

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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN JANUARY TERM, 1818, IN THE FORTY-SECOND YEAR OF OUR
INDEPENDENCE.

S. AND J. RATHBON against BUDLONG.

THIS was an action of *assumpsit*, on a promissory note, tried before the chief justice, at the last *Albany* circuit.

The note was in the following words:—"Ninety days after date, I promise to pay *S. & J. L. Rathbon*, or order, three hundred and two $\frac{23}{100}$ dollars, value received, for the *Susquehanna* Cotton and Woollen Manufacturing Company. *Albany*, June 24th, 1815. *Samuel Budlong*, agent."

The defendant gave in evidence a bill of parcels, headed as follows:—"The *Susquehanna* Cotton and Woollen Manufacturing Company, bought of *S. & J. L. Rathbon*," &c., at the bottom of which was the following receipt:—"Albany, June 24th, 1815. Received payment, by a note payable in ninety days, which, when paid, will be in full of the above." It was admitted that the purchase of the goods of the plaintiff, and giving the note, were simultaneous acts. The defendant produced in evidence a power of attorney from the *Susquehanna* Cotton and Woollen Manufacturing Company, under their corporate seal, authorizing him to purchase and sell goods, &c., make bargains, &c., draw bills and promissory notes, for them and in their names, and generally to manage the business of the company, as the defendant should think fit, &c., subject to the control and direction of the trustees of the company, &c.

An agent who makes a contract in behalf of his principal, whose name he discloses, at the time, to the person with whom he contracts, is not personally liable.

There is no difference, in this respect, between an agent for government and for an individual. (a)

[* 2]

(a) *Hills v. Bannister*, 8 Cow. Rep. 31. *Shiras v. Morris*, *Ibid.* 60. *Fox v. Drake*, 8 Cow. Rep. 191. *Stone v. Wood*, 7 Cow. Rep. 453. *Gill v. Brown*, *Walker v. Shoartwout*, 12 Johns. Rep. 383, 444. *Hodgson v. Dexter*, 1 Cranch, 345. *Swift v. Hopkins*, 13 Johns. Rep. 313. *Bronson v. Woolsey*, 17 Johns. Rep. 46.

ALBANY,
January, 1818.

RATHBON
V.
HENDLICK.

A verdict was found for the plaintiffs, for 347 dollars and 7 cents, subject to the opinion of the Court, on a case, as above stated.

Foot, for the plaintiffs, contended, that the defendant had made the contract *personally*, and not in the name of his principals. The note was, "I promise to pay," &c. An agent or attorney cannot draw or sign bills or notes in the name of another, without a special authority for that purpose. Here the defendant had a special power; but he did not sign the names of his principals. (9 Co. 76. 1 Str. 705. Lord *Raymond*, 1418. 6 Term Rep. 176. 2 East, 142. *Appleton v. Binks*, 5 East, 148. *Buffum v. Chadwick*, 8 Mass. Rep. 103.) There is no distinction, in this respect, between contracts under seal and contracts not under seal.

Henry, contra, was stopped by the Court.

SPENCER, J., delivered the opinion of the Court. It is perfectly manifest that the note, on which the suit is brought, was given by the defendant, as agent for the *Susquehannah* Cotton and Woollen Manufacturing Company, and that the goods for which the note was given were sold on the credit of that company. To charge the defendant with the payment of the note, would violate every principle of justice and equity; nor is the law so unjust. The general principle is, that an agent is not liable to be sued upon contracts made by him on behalf of his principal, if the name of his principal is disclosed and made known to the person contracted with, at the time of entering into the contract. This doctrine is fully supported by the case of *Owen v. Gooch*, (2 Esp. Rep. 567.) In fact, there is no difference between the agent of an individual and of the government, *as to their liabilities. The question, in all cases, is, To whom was the credit given?

There are cases of covenants where persons have made themselves personally liable, because they have covenanted and bound themselves under seal, in which cases the principals were either not disclosed, or were not bound, or the agent meant to bind himself personally. In the present case, the credit was not only given to the company, but they were bound by the note of their agent; and there is not the least pretence to hold the agent responsible.

Judgment for the defendant. (a)

(a) Vide *Sheffield v. Watson*, 3 Caines's Rep. 69.

ALBANY.
January, 1818.JOHNSON, Administrator of JOHNSON, against BEARDSLEE
and others, Heirs and Devisees of BEARDSLEE.JOHNSON
v.
BEARDSLEE

THIS was an action of *assumpsit*, to the declaration in which the defendants pleaded *non assumpsit*, and the statute of limitations, and the plaintiff replied, taking issue on the latter plea. The suit was commenced in *August* term, 1814, and the parties, without going to trial, made a case for the opinion of the Court, which was submitted without argument.

In the summer of 1805, the plaintiff's demand was placed in the hands of one *Pumpelly*, with whom it was liquidated by *John Beardslee*, the testator, and the balance struck. The testator died in 1806. After his death, and within six years before the commencement of the suit, the demand was presented to two of the defendants, who were also executors of the deceased, who admitted the balance to be due, and promised to pay it.

**Per Curiam.* The demand of the plaintiff was liquidated with *John Beardslee*, in 1805, and he died in 1806; consequently, before the statute of limitations had attached on the debt. Within six years before this suit was brought, two of the defendants, and who were also executors of *John Beardslee*, admitted the demand, and promised payment.

Whether the new promise revives the old debt, or can be enforced as a new promise upon a valid consideration, is immaterial to be discussed here. On a review of all the cases, (*Danforth v. Culver*, 11 *Johns. Rep.* 146.) we were of opinion, that the acknowledgment of the execution of the notes, with an express declaration that the party meant to avail himself of the statute of limitations, was not evidence of a new promise to pay; but we did not intimate, that an acknowledgment of the debt would not have been sufficient, unaccompanied with a protestation against paying it; indeed, there is a current of authorities, that an acknowledgment of the debt is evidence sufficient for the jury to presume a new promise.

Here, however, is not only an acknowledgment of the debt, but an express promise to pay; and it has always been holden, that a debt, barred by the statute, is a sufficient consideration to uphold a promise. With respect to the other defendants, who have not acknowledged the demand, or promised to pay it, the acknowledgment of one joint debtor, of the existence of the debt, is sufficient to take the case out of the statute. (*Smith v. Ludlow*, 6 *Johns. Rep.* 267. 2 *H. Bl.* 340. *Doug.* 652.) The Court see no reason why that principle should not apply to the

The promise of one joint debtor to pay a debt barred by the statute of limitations, is sufficient to take the case out of the statute. (a)

In an action against the heirs and devisees of a deceased debtor, a promise by two of the defendants, who were also his executors, to pay the debt, was held sufficient to charge all the defendants.

[* 4]

It seems, that an acknowledgment of the debt, unaccompanied with a protestation against the payment of it, is evidence sufficient for the jury to presume a new promise

(a) Vide *Dean v. Hewitt*, 5 *Wendell's Rep.* 257. *Rogers v. Rogers*, 3 *Ibid.* 503. *Hammond v. Huntley*, 4 *Conn. Rep.* 493. *Clementson v. Williams*, 8 *Cranch*, 72; but see *Bell v. Morrison*, 1 *Peters's Rep.* 331.

ALBANY,
January, 1818.

COLLINS
v.
RAGREW.

case of executors, heirs, and devisees, as well as to every other case.

Judgment for the plaintiff.

[* 5]

*COLLINS *against* RAGREW.

In an action under the 2d section of the act to prevent gaming, (sess. 21. c. 46. 1 N. R. L. 153.) by the losing party against the winner, to recover back money lost at play and paid, the plaintiff may declare generally, in debt for money had and received, without stating his case specially, or referring to the statute; but it is otherwise in the case of an action brought by a common informer: (a)

IN error, on a bill of exceptions, to the Court of Common Pleas of the county of *Ontario*.

The plaintiff in error brought an action of debt, in the Court below, against the defendant in error, and declared generally, for money borrowed by the defendant of the plaintiff, and for money had and received by the defendant to the plaintiff's use. The defendant pleaded *nil debet*; and, at the trial, in *May* term, 1817, in the Court below, the plaintiff's counsel stated that the action was founded on the second section of the act, entitled, "An act to prevent excessive and deceitful gaming," passed the 21st of *March*, 1801, and offered to prove, that the plaintiff, at one time or sitting, by playing at cards, lost to the defendant the sum of 170 dollars, and paid the same to him, and that the plaintiff, within three months thereafter, sued out a writ of *capias ad respondendum*, and commenced this action, to recover back the money which he had lost. This evidence was objected to, on the part of the defendant, on the ground that it was inadmissible, under the plaintiff's declaration, which contained no reference to the statute; and the Court, being of this opinion, nonsuited the plaintiff.

The bill of exceptions was submitted without argument

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Per Curiam. This case comes before the Court, on a writ of error to the Common Pleas of *Ontario* county, founded on a bill of exceptions duly taken. It presents the question, whether, in an action, brought by the *losing* party, to recover back money lost at gaming, he is bound to declare specially, or may declare generally, under the statute, for money had and received; and the statute would seem too plain and explicit to admit of any doubt, that he may declare generally. This is expressly authorized by the act, (1 N. R. L. 153.) (b) The case of *Cole v. Smith* (4 *Johns. Rep.* 193.) does not apply. There the action was by a common informer, the *losing party not having brought his suit within the time limited by the act. In such case, the act does not give any form of declaring, and it was held, that he must state the special matter upon which his cause of action was founded. But it is almost necessarily to be inferred, from what is said by the Court, that a general count would be good, when the suit was by the losing party. The

(a) *Vide Allen v. Ople*, 7 *Cow. Rep.* 426.

(b) 1 *R. R.* 682.

judgment must be reversed, and a *venire de novo* issued, returnable in the Common Pleas of *Ontario* county.

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Judgment reversed.

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GOODRICH AND DE FOREST *against* GORDON. (a)

THIS was an action of *assumpsit*, to recover the amount of a bill of exchange drawn by *William Napier* upon the defendant, in favor of *James Stewart*, and by him endorsed to the plaintiffs. The cause was tried before his honor, the chief justice, at the *New-York* sittings, in *April*, 1816.

The defendant, jointly with certain other persons, was owner of the sloop *Hope*, and cargo, which, in *December*, 1813, was sent on a voyage from *New-York* to *Savannah*; and the following letter of instructions, dated *December* 6th, 1813, was delivered by the defendant to *Napier*, the master of the sloop.

"Sir,—The sloop *Hope*, now under your command, being ready for sea, you will proceed to the *Hook*, and if no cruisers are off, you will take advantage of the first good opportunity, and proceed to sea, and make every despatch *for *Savannah*. I would recommend you to get a good offing, say without the gulf stream; then keep southwardly, until you get *St. Catharine's* to bear west; then make the best of your way into port. Should you touch at the southward of *Savannah*, you will be able to get information, and, if necessary, you can take an inland passage. Your vessel is addressed to my brother, *George Gordon*, under whose instructions you will place the vessel after your arrival. Should you unfortunately fall in with, and be captured by, an *English* cruiser, you will endeavor to ransom the vessel and cargo, as low as possible, say not to exceed two thousand dollars: your draft on me, or my brother, will be duly honored, or, should they take you to *Tybee*, you can go ashore, and bring off the specie. I, however, trust you will be more fortunate; but, should it so happen, it will be fulfilled, in good faith. Wishing you a prosperous voyage, I am, &c. *Chas W. Gordon*."

The ransom of a vessel and cargo captured by an enemy is a lawful contract, and an action may be maintained in our Courts to recover the money agreed to be paid to the captor on such ransom. (b)

Nor is it unlawful, after the capture, to receive a passport from the captor, to protect the vessel from another capture.

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Where a person, by writing, authorizes another to draw a bill of exchange, and stipulates to honor the bill, and a bill is afterwards drawn, and taken by a third party, on the faith of the written engagement, this is tantamount to an acceptance of the bill. (c)

On her voyage, the sloop was captured by the *British* frigate *Endymion*, and was ransomed by the master for the sum of 2,000 dollars, for which amount he drew the following bill on the defendant.

(a) This cause was decided in *January* term, 1817.

(b) *Maison-tire v. Keating*, 2 *Guths*, 325.

(c) Vide *Greele v. Parker*, 5 *Wendell's Rep.* 414. *Coolidge v. Payson*, 2 *Wheat. Rep.* 6. *Parker v. Greele*, 2 *Wendell's Rep.* 545. *Leonard v. Mason*, 1 *Ibid.* 322. *Cook v. Satterlee*, 6 *Cooven*, 108. *Schinnelpennick v. Bayard*, 1 *Peters's Rep.* 264.

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\$2,000.

H. B. M. ship *Endymion*,
At sea, December 21st, 1813.

Sir,

Ten days after sight of this my second of exchange, first, third, and fourth, of the same tenor and date, not paid, please to pay to *James Stewart*, Esq. or order, on behalf of the officers and crew of his *Britannic Majesty's* ship *Endymion*, the sum of two thousand hard *Spanish* dollars, in specie, being the amount for which I have ransomed the sloop *Hope*, and cargo, (this day captured by the said ship,) agreeably to your letter of the 6th instant, and for which I have received the passport of the captain. To be honored, with or without further advice.

Your obedient, humble servant,

Wm. Napier, Master of the sloop *Hope*.

Mr. Charles W. Gordon, Merchant, *New-York*."

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**Napier*, at the same time, delivered his letter of instructions to *Stewart*, and received a passport, as mentioned in the bill. A number of *American* prisoners were also put on board the sloop, with a quantity of provisions for their support, and she was furnished with a new mainsail and foresail, or jib. During the voyage, the prisoners compelled the master to put into *Charleston*, where the sloop arrived, and the cargo was unladen, and came into the hands of the consignee. The bill and letter of instructions were received by the plaintiffs, and the amount, on the faith of the letter, was credited to the remitter, with whom the plaintiffs had had previous dealings, but whether this was *Stewart* or some other person, did not clearly appear. The defendant had received from the other part owners of the vessel, 1,000 dollars, as their proportion of the ransom money.

A verdict was found for the plaintiffs, subject to the opinion of the Court, on a case containing the facts above stated.

Ely, for the plaintiffs, contended, 1. That the ransom was a valid contract, under the law of nations. (2 *Azuni*, 313. 2 *Emerig.* 464. ch. 12. s. 21. *Valin*, 138 art. 66. *Cornu v. Blackburne*, *Doug.* 641. *Yates v. Hall*, 1 *Term Rep.* 73.) Such contracts are highly beneficial in mitigating the evils of war. They ought to be fulfilled, on principles of common honesty, and for the honor of nations. *Si quid singuli, temporibus adducti, hosti promiserint, est in eo fides conservanda.* The Courts of no nation have refused to give effect to them, unless prohibited by some statute or ordinance founded on principles of state policy. Thus, in *England*, by the statute of 22 *Geo.* III. ch. 25, contracts for the ransom of *British* ships were declared unlawful, because, possessing a great navy, such contracts diminished the chance of recaptures. But *France*, *Holland*, and other maritime powers, regard these contracts as binding under the law of nations. When the subject was brought before Con-

gress, in 1813, they refused to pass a law prohibiting ransoms; thus leaving them, in this country, to be governed by the general law of nations.

*If, then, the ransom was lawful, the passport mentioned in the bill, which was a necessary incident to it, cannot affect its validity. The act of Congress, (13 Cong. sess. 1. ch. 56.) August 2d, 1813, prohibiting the use of *British* licenses or passes, is to be taken only in reference to licenses to trade. It could never have been intended to apply to the case of a ransom.

2. There was a valid acceptance of the bill. The bill was for a valuable consideration, and the letter of instructions, which contained the engagement to accept a bill so drawn, was attached to the bill, and passed with it. In *M'Evers v. Mason*, (10 *Johns. Rep.* 215.) the Court, after a review of the *English* authorities, inclined to the opinion, that, where a third person gives credit on the faith of the promise to accept, it would be binding; and the principle of the decision in the case of *Weston v. Barker*, (12 *Johns. Rep.* 276.) is strongly in point. There *B.* accepted certain securities placed in his hands by *A.*, who ordered *B.* to pay the balance to *C.*; and it was held that *C.* might maintain an action against *B.* on his implied promise. In *M'Kim v. Smith & Steene*, in the County Court of *Baltimore*, *Nicholson*, Ch. J., was clearly of opinion, that such a promise to accept a bill shown to a third person, who gave credit on the faith of it, was binding, and that it made no difference whether the credit was given *before* or *after* the bill was drawn. (1 *Hall's Law Journal*, 488.)

Anthon, contra. 1. A ransom is an illegal contract, at common law; and Lord *Kenyon*, in *Havelock v. Rockwood*, (8 *Term Rep.* 269—277.) considered the ransom acts as remedial laws. All trading with an enemy, during war, without the license of government, is unlawful. (*Potts v. Bell*, 8 *Term Rep.* 543.) Contracts of ransom have merely been tolerated by certain nations. They are clearly against the sound policy of all maritime powers, because they deprive their cruisers of the chance of recapture. Again; this contract is within the scope and meaning, if not within the letter, of the act of Congress (13 Cong. sess. 1. ch. 56.) prohibiting our citizens from using, directly or indirectly, *a license, pass, or other instrument, granted by the *British* government for the protection of any ship, &c.

2. Here was no valid acceptance of the bill. This question came up collaterally in the case of *M'Evers v. Mason*, and *Kent*, Ch. J., examined the authorities, but the Court expressed no decided opinion. The arguments, however, of the learned counsel for the defendant, in that case, may be applied, with great force, to the present. The later decisions in *England* certainly go to establish the doctrine that a promise to ac-

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cept a bill not drawn, or not yet in existence, does not amount to an acceptance.

Again; the master, in this case, exceeded his authority. He not only gave a bill for 2,000 dollars, but took on board prisoners, who, by their mutinous conduct, defeated the whole adventure. An agent who acts under special authority, must strictly pursue that authority. If he varies from it, in any material degree, his act is void. (*Batty v. Caswell*, 2 Johns. Rep. 48.)

Wells, in reply. 1. *A ransom* is lawful. The law of nations, as well as the common law of *England*, sanctions such a contract. This is not a trading with an enemy. It is not, like the case of *Potts v. Bell*, a voluntary contract. By the capture, all the rights of the owner were divested; and, to regain the whole, he consented to give a part. In case of a recapture, he would regain his property on paying *salvage*. It may be a question of policy, whether he will be allowed to be the *salvor* or not; and a particular government may deem it proper, from its own views of policy, in order to encourage its own cruisers, to prohibit ransoms; but until there is some statute or ordinance prohibiting them, there is nothing which renders the contract unlawful. The cases of *Havelock v. Rockwood*, and *Potts v. Bell*, are not applicable. They were decided on different grounds.

As to the objection, that the case is within the operation of the act of Congress, in regard to *British* licenses, it is manifest, that ransoms were not the evils which that statute was intended to prevent. It meant merely to superadd a penalty to acts already unlawful. Besides, the bill was given for the ransom, not for the passport, which was a subsequent act. But the proviso, in the second section of the act of Congress, allowing the acceptance and use of a passport from the enemy, for the purpose of carrying *American* prisoners to the *United States*, would be sufficient to save this case from the operation of the act.

2. The question as to an acceptance of a bill not drawn, was discussed in *M'Evers v. Mason*; but this is not the case of a principal writing to his agent, and promising to accept bills drawn on him. It is, in substance, a letter of credit, or an authority to enter into a contract, according to the letter of instructions. The promise was as valid *before* as *after* the bill was drawn; this was admitted in the case of *Johnson v. Collins*. (1 East, 98.)

Again; the consignee, the authorized agent of the defendant, received the property ransomed, and disposed of it for the benefit of the defendant; and two of the joint owners have paid to the defendant their proportion of the ransom. This amounts to a virtual acceptance of the bill. The master did not exceed his power. He was authorized to ransom the vessel for 2,000 dollars; and taking prisoners on board would rather diminish than increase the ransom. If paid for taking the prisoners, it

was a separate and independent contract. But it is enough that the consignee afterwards accepted the ransomed ship and cargo at *Charleston*.

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THOMPSON, Ch. J., delivered the opinion of the Court. There can be no doubt that the contract for the ransom of the vessel was a lawful contract. Such contracts are sanctioned by the laws of nations, and are not deemed a trading with the enemy; (2 *Azuni*, 313.) nor was the passport given by the captors, upon the ransom, and accepted by the master of the captured vessel, in violation of the act of Congress. (2d Aug. 1818.) It was merely a certificate, given by the captors, to serve as a passport, and protect the ransomed vessel from all other armed vessels belonging to the nation of which the captors were subjects, and to prevent another capture. (2 *Azuni*, 316.) It may, perhaps, come within the exception to the act of Congress, (2d sec.) which declares that the act shall not prevent the acceptance of a *passport, granted by the commander of any ship of war of the enemy, to any ship or vessel of the *United States*, which may have been captured and given up, for the purpose of carrying prisoners, captured by the enemy, to the *United States*. Admitting, however, that the instrument given in the case before us is not the one contemplated by this provision, still, I think, the act does not at all extend to such certificates.

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The only question in this case, then, is, whether the defendant is chargeable as an acceptor of this bill. In *Pillans & Rose v. Van Mierop & Hopkins*, (3 Burr. 1663.) Lord Mansfield, and the whole Court, go the full length of saying, that a promise to accept a bill is equivalent to an acceptance, whether it be before or after the bill is drawn. Lord Mansfield, however, afterwards, in the case of *Pierson v. Dunlop*, (Cowp. 573.) in some measure, limits and qualifies his former doctrine. He observes, that it has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, *I will duly honor it*, is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by endorsement; but if there are any such circumstances, it may amount to an acceptance; thereby confining the rule to cases where third persons have acted upon the faith of such assurances, and have been induced, in consequence thereof, to take the bill. In *Johnson v. Collins*, (1 East, 98.) the rule, as laid down in *Pillans v. Van Mierop*, is certainly overruled; and, from the observations of the judges, the limitation and qualification, as contained in *Pierson v. Dunlop*, is not either sanctioned or approbated; nor am I aware that it has been expressly adopted, in any subsequent decision, in the *English Courts*. But I think it may fairly be inferred, from the observations of the late chief justice, in *M'Evers v. Mason*, (10 Johns. Rep. 214.) that the rule, as laid down in *Pierson v. Dunlop*, is approved of by this Court. It is there said, every one will agree,

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that an acceptance by a collateral paper may be good, and if that paper be shown to a third person, so as to excite credit, and induce him to advance money on the bill, such third person ought not to suffer by the confidence excited. Whether these observations *were intended to apply to collateral acceptances of a bill already drawn, or to be afterwards drawn, does not appear. But I cannot see any sound principle upon which the cases can be distinguished. No question of want of consideration can arise in either case, and it is the credit, which such acceptance or engagement to accept has given to the bill, which gives to it its binding operation. The testimony in the case before us is very full to show, that this letter of the defendant, authorizing the drawing of the bill, accompanied it, at all times, and that it was upon the credit of that letter that the bill was taken by the plaintiff. It appears to me to be a gross violation of good faith, in the defendant, now to disclaim the authority of the captain to draw the bill. The letter may well be considered as an authority to draw, accompanied by a promise to accept. It was an authority given for the express purpose of enabling the captain to draw the bill, which was an act done for the benefit of the defendant, and according to his instructions; and I think it binding upon him as an acceptance; and this is the opinion of the Court. The plaintiff is, accordingly, entitled to judgment. (a)

Judgment for the plaintiff.

(a) Vide *Coolidge v. Payson*, (2 *Wheaton*, 66.) in which the Supreme Court of the United States decided, "upon a review of the cases with are reported, that a letter, written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

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*P. AND G. LORILLARD *against* PALMER and others. (b)

Goods were laden on board of a vessel to be transported from Richmond to New-York.

THIS was an action of assumpsit, for the non-delivery of a quantity of tobacco, shipped on board the schooner *Seaman*, of which the vessel proceeded on her voyage in the beginning of February, but finding the *Chesapeake* blockaded by a hostile squadron, and that it would be impossible to put to sea without being captured, went into *Norfolk*, and finally returned to *Richmond*. In September following, the plaintiffs demanded their goods, in order to transport them to *New-York*, by land, but the master refused to deliver them unless on being paid half freight; and a few days thereafter, the vessel, with the goods on board, was totally lost, without the default of the defendants or the master, the blockade having continued until that time: Held, that the defendants had no claim for freight, the voyage not having been performed; and that more than a reasonable time having elapsed for sending on the goods, they had no right to retain them, and were liable to the plaintiffs for their value, notwithstanding they were lost by inevitable accident.

The ship owner is bound to deliver the goods to the consignee within a reasonable time; and it is only on the delivery of them that he is entitled to freight. If he is unwilling or unable to forward them, the freighter is entitled to receive them back without paying any freight.

Where the completion of the voyage is prevented by a permanent blockade, and the vessel is unable to put to sea, and she returns after having proceeded to the mouth of the bay, on which her port of lading is situated, the ship owner is not entitled to freight *pro rata*, and the freighter is entitled to receive his goods without paying freight, the blockade putting an end to the contract. (c)

(b) This case was decided in August, 1817.

(c) Contra, *S. C. in error*, 16 *Johns. Rep.* 348. *Ogden v. Barker*, 18 *Johns. Rep.* 87. Vide *Stoughton v. Rappals*, 3 *Serg. & Rawle*, 559.

which the defendants were owners, at *Richmond*, in *Virginia*, to be delivered to the plaintiffs in *New-York*, pursuant to a bill of lading, dated *January* 21st, 1813, signed by the master of the schooner. The cause was tried before his honor the chief justice, at the *New-York* sittings, in *April*, 1816.

The schooner *Seaman*, in *January*, 1813, during the late war between this country and *Great Britain*, was lying in the port of *Richmond*, bound for *New-York*, and 13 hogsheads of tobacco were shipped on board of her by the plaintiffs' agent. About the 26th or 27th of *January*, the vessel set sail on her voyage for *New-York*, and on the 2d of *February*, the master of the vessel came to anchor in *Hampton Roads*, for the purpose of ascertaining whether he could safely proceed to sea, there being at that time a *British* squadron blockading the *Chesapeake*, through which the vessel must necessarily pass. When he had ascertained the impossibility of getting to sea without being captured, and the danger of remaining in *Hampton Roads*, by the advice of Captain *Stewart*, of the *United States'* navy, commanding on that station, he put into *Norfolk*, and there remained until about the 7th of *March*, when, on account of the increase of the *British* squadron, it was deemed unsafe to remain at *Norfolk*, and he returned with the vessel to *Richmond*, where she arrived on the 15th of the same month. The schooner continued at *Richmond* until the 21st of *September*, when, in consequence of a violent storm and freshet, she was sunk at the wharf, without any fault or negligence of the defendants or their agents, and the tobacco in question was wholly ruined and spoiled. At the time the bill of lading was signed, it was not known at *Richmond*, that the *Chesapeake* was blockaded, nor was it known by the master or the defendants; and, in fact, the blockade did not then exist; but it continued, without intermission, from the time the vessel attempted to sail on her voyage, until after she was lost. On the 16th of *September*, after her return to *Richmond*, the agent of the plaintiffs demanded the tobacco from the master, for the purpose of forwarding it to *New-York*, by land, and he refused to deliver it, unless on being paid half freight.

A verdict was taken for the plaintiffs, for the invoice price of the tobacco, with interest, subject to the opinion of the Court, on a case to be made, which either party might turn into a bill of exceptions, or special verdict.

D. B. Ogden, for the plaintiffs. The contract of affreightment, like all other contracts, must be performed in a *reasonable time*. The plaintiffs, having waited from *January* to *September*, were entitled to receive their goods, on demand, without paying any freight. (*Herbert v. Hallett*, 3 *Johns. Cas.* 93. 98.)

The contract was made during war, and the defendants were to receive a *war* freight. They knew that they must encounter

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the hazards incident to a state of war. It was their duty to attempt to reach *New-York*, notwithstanding the blockade, and if apprehensive of capture, they might have had the vessel and freight insured against that peril. There is no exception of any such hazards; and the apprehension of capture, however well founded, is no legal excuse for the non-performance of the contract, (*Atkinson v. Ritchie*, 10 *East*, *Rep.* 530. *Abbott on Ships*, 361.)

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As to the claim of the master for half freight, there was no pretence for it. The defendants were entitled to the whole freight, or none. There could be no apportionment *of freight. No freight is due, where the vessel returns to her port of departure, without performing the voyage, (*Griswold v. New-York Insurance Company*, 1 *Johns. Rep.* 205. 212.)

Colden, contra. This case is distinguishable, in some of its most important features, from those which have been cited. It is not a contract of charter-party; but the goods were shipped, under a bill of lading, on board of a *general ship*. This is an action of assumpsit, to recover the value of the goods. It is not pretended, that the non-delivery of them, or the loss, has proceeded from any negligence or fault of the defendants. The claim of the plaintiffs rests solely on the ground, that the defendants refused to return the goods to them when they were demanded. But we contend, that the shipper cannot, after the voyage is commenced, demand his goods without paying freight, unless the master is in fault. (*Moloy*, b. 2. ch. 4. s. 5. *Beaver's L. M.* 103. 137. *Mulyne*, 98. *Herbert v. Hallett*, 3 *Johns. Cas.* 93.) The master may insist on carrying on the goods, so as to be entitled to his freight. (*Griswolds v. New-York Insurance Company*, 1 *Johns. Rep.* 204. *S. C.* 3 *Johns. Rep.* 321. *Bradhurst v. Columbian Insurance Company*, 9 *Johns. Rep.* 17.) Having a *lien* on the goods for his freight, he cannot be deprived of that *lien*, without a tender of the freight. If he gives up the goods, he loses his *lien*. The obstruction to the *Chesa peake*, in this case, was not a regular blockade; it was a temporary obstruction, and might be removed the very next day. The master was justified, therefore, in waiting for its removal. Admitting that a war freight was to be paid,—a fact which does not appear in the case,—yet the ship owners were not, therefore, bound to encounter imminent peril, or inevitable loss, by running into the arms of the enemy. Fear of capture will excuse a deviation. (*Reade v. Commercial Insurance Company*, 3 *Johns. Rep.* 352. *Post v. Phenix Ins. Company*, 10 *Johns. Rep.* 79. *Suydam & Wyckoff v. Marine Insurance Company*, 2 *Johns. Rep.* 138.) If, then, the master was justified in putting back, and returning to *Richmond*, to avoid capture, he was equally justified in remaining. In **Barker v. Cheriote*, (2 *Johns. Rep.* 352. 356.) *Thompson*, Ch. J., says, the master ought to have waited at *A.* for the removal of the detention of the cargo; and that,

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being an entire voyage, out and home, there could be no apportionment of freight. It is well settled, that if the owner takes his goods, after the voyage is commenced, and before it is completed, he must pay freight for them *pro rata*. (*Luke v. Lyde*, 2 Burr. 882. *Lutwyche v. Grey, Abbot*, 298. part III. ch. 7. s. 13.)

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S. Jones, jun., in reply. The bill of lading contains a positive engagement to deliver the goods to the plaintiffs, the dangers of the sea only excepted; the defendants thereby taking upon themselves all other risks. The plaintiffs, after waiting a reasonable time, had a right to say to the defendants, "Carry on the goods, agreeably to your contract, or return them to us." The defendants refused to deliver them, and made no offer to carry them on by land, or in any other way, but insisted on receiving half of the freight. If a ship becomes damaged during the voyage, the owner is allowed a reasonable time, and no longer, to make the necessary repairs, and to proceed on the voyage. Where there is no limited time expressed in the contract, it must be always understood to mean a reasonable time. The cases which have been cited, all show, that in case of accident during the voyage, the master must send on the goods by another ship, by lighters, or by land, or in the best practicable mode, in order to entitle himself to freight. (*Bradhurst v. Col. Ins. Co.* 9 Johns. Rep. 9. *Schieffelin v. The N. Y. Ins. Co.* 9 Johns. Rep. 21. 3 Johns. Rep. 331. 10 East, 393. *Park*, 221.) In *Gosling v. Higgins*, (*Campb. Rep.* 451.) Lord Ellenborough was of opinion, that the seizure of the goods, by the officers of government, and that without any fault of the master, did not excuse the non-delivery of them. *Wilson v. R. Ex. Ass. Co.* 2 Campb. Rep. 624.

As to *pro rata* freight, that is never demandable, except at a port of necessity, and is not payable, where the ship returns to her port of departure. The right to *pro rata* freight is wholly founded on the acceptance of the goods by the owner, at the intermediate port. The master has no *lien* on the goods for such freight. A *lien* is allowed only in favor of a person who has performed his contract.

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THOMPSON, Ch. J., delivered the opinion of the Court. The claim, in this case, is founded on the non-delivery of a quantity of tobacco, shipped on board a schooner, of which the defendants were owners, to be transported from *Richmond*, in *Virginia*, to *New-York*, and there delivered, pursuant to a bill of lading for that purpose, signed by the master of the schooner. The vessel, with the tobacco on board, sailed on the voyage about the 25th of *January*, 1813, but, finding the *Chesapeake* blockaded by a *British* squadron, was unable to proceed on the voyage, and some time in *March* following returned to *Richmond*, where she remained with the tobacco on board, until the

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16th of *September*, when the agent of the plaintiffs demanded the tobacco, which the master of the schooner refused to deliver, unless he was paid *half freight*, which the agent refused to pay; and on the 21st of the same month of *September*, the schooner, in consequence of a violent storm and sudden freshet, was sunk at the wharf, and the tobacco wholly ruined and lost.

The case does not warrant the conclusion that the loss was attributable to the negligence of the master, or the want of proper care of the vessel. Here has, therefore, been a dead loss, without any real or actual fault, other than the non-delivery of the tobacco when demanded.

The only question in the case is, whether the master was bound to comply with the demand without receiving the half freight claimed. It appears, by the case, that the blockade was not known to the parties at the time the schooner sailed from *Richmond*; and it continued until after the loss happened. Although it may appear equitable that the owners of the vessel should receive some compensation for the care they had taken of the plaintiffs' goods, yet I know of no principle of law on which half freight could be claimed. The defendants had a right to demand either full freight, or none at all. But I think no freight could be claimed. Whenever any accident occurs to a vessel, or there is any interruption of the voyage, the ship owner has a reasonable time to repair his vessel, or wait for the removal *of the obstruction, and then to carry on the cargo and earn his freight. But there must be a limitation to such delay. It would be a monstrous doctrine to allow the ship owner to retain the cargo, and perform the voyage when he pleased. No time being specified in the bill of lading for the delivery of the goods, the general rule of law applicable to the performance of all other contracts, must govern, to wit, that it must be done in a reasonable time. Although the right to freight commences on the loading of the goods, it is a defeasible right, depending on the success of the voyage; and in case no part of the *iter* is performed, to any beneficial purpose, no freight is earned. (3 *Johns. Cas.* 97.) If the ship owner is determined to have his freight, he must forward the goods. It is upon the delivery of the cargo that the right to freight depends, unless such delivery is waived, or some new contract is made respecting it. If the ship owner will not, or cannot, carry on the cargo, the freighter is entitled to receive his goods again without paying any freight. (*Hunter v. Prinsep*, 10 *East*, 393.) Any other rule would be hard and unjust upon the merchant. (9 *Johns. Rep.* 20.)

The question, in all cases of this kind, must depend, in a great measure, upon the particular circumstances of each case, according to the nature and cause, as well as the length, of the delay. In the case before us, the plaintiff had waited a reasonable time for the goods to be carried on. Nearly nine months had elapsed from the time of shipment, and the tobacco was

wanted by the plaintiffs to be sent on in some other way. If the defendants were bent upon receiving their freight, they should have transported the goods in some way or other. If not by water, they should have sent them on by land, which might have been done, though at a much greater expense. But as the freight to be paid was a war freight, it might, perhaps, have warranted such transportation. The blockade of the *Chesapeake* was not such a temporary obstruction as that it could reasonably be calculated that it would be removed in a short time. From the length of time it had already continued, and the local importance of the place, no doubt could be entertained but that it was intended as a permanent measure of hostility, to be continued as long as the war lasted, if in the power of the *enemy to maintain it. There was, therefore, no reasonable prospect of the goods being carried on by water. It would be extremely unjust, if the merchant could not again obtain his goods, either to sell, or send them on in some other way, without being charged with the freight, when no part of the voyage had been performed. The ship owners would not have been bound to keep their vessel with the cargo on board until the blockade was removed. They must have had a right, after a reasonable time, to re-deliver the cargo, and discharge themselves from the bill of lading. There would be no reciprocity, unless the merchant might, within a reasonable time, demand his goods, when all prospect of sending them on had failed.

This is not like an embargo, or some temporary obstruction to the performance of the voyage, which might furnish an excuse for the delay, without putting an end to the contract. The effect of the blockade upon the bill of lading is very much the same as upon a charter-party. It is well settled, that, by the blockade of the port of discharge, a charter-party is dissolved, and all claim to freight under it is gone. *Scott v. Libby and others* (2 Johns. Rep. 336.) is a very strong case on the point. The vessel was chartered on a voyage from *New-York* to the city of *St. Domingo*, and back to *New-York*. On arriving in sight of *St. Domingo*, she was turned away, on account of the port being blockaded. On her return to *New-York*, the owners of the vessel refused to deliver the cargo until the freight was paid. But in an action of *trover* for the goods, it was held that no freight was due; that there could be no *pro rata* freight, because the goods were brought back to the port of lading, and no benefit accrued to the owner. So, in the case before us, the goods were brought back to the port of lading, and no benefit had accrued to the plaintiffs, and the compensation claimed must have been in the nature of a *pro rata* freight.

Suppose, in this case, the tobacco had not been lost, and an action of *trover* had been brought by the owner, it would have been very analogous to that of *Scott v. Libby*. If an action of *trover* could have been sustained without paying the freight, it must follow, as matter of course, that the defendants are respon-

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sible for the loss; because they were in *default in not delivering the tobacco when demanded. We are, upon the whole, of opinion, that, under the circumstances of this case, the plaintiffs had waited a reasonable time for the defendants to send on the goods and earn their freight; and being in default, by not delivering the tobacco when demanded, they must be responsible for the subsequent loss. The plaintiffs must, accordingly, have judgment upon the verdict of the jury.

Judgment for the plaintiffs

DOLF, Widow, against BASSET.

Where A. and B. purchased a piece of land, and divided it between them, and A., being in the exclusive occupation of his part, sold it to D., but both A. and B. joined in the conveyance, it was held that, although the deed from A. and B. might be *prima facie* evidence that they were tenants in common of the part conveyed, yet that the occupation of the land by A., and the defendant's purchasing it of him exclusively, were evidence

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of A.'s seisin of the whole, so as to entitle A.'s widow to dower out of the whole of his part of the land originally purchased by A. and B., and not merely in a moiety of that part. (a)

THIS was an action of dower, for the recovery of dower in certain lands in the town of *Chatham*, in *Columbia* county. The cause was tried before Mr. J. *Van Ness*, at the *Columbia* circuit, in *September*, 1816.

Simon Dolf, a witness on the part of the demandant, testified that he was acquainted with the farm formerly in the possession of *Jonathan Dolf*, the husband of the demandant, which contained 150 acres, besides the part that *Dolf* afterwards got of *Stephen Hare*; that *Jonathan Dolf* formerly lived on the farm, and that the tenant came into possession, about 20 or 22 years before the trial, under *J. Dolf*, claiming it by purchase from him. The witness further stated, that *J. Dolf* and his brother *Charles Dolf* purchased the farm together, and then divided it, a division fence being put up, and each occupying his part separately, and that the tenant had got *J. Dolf's* part; that the deed was given to *C. Dolf*, and the witness did not know that *J. Dolf* ever took a deed for his part; but when he sold to the tenant, the deed was executed by both *Charles* and *Jonathan*. The demandant produced the record of the deed from *J.* and *C. Dolf*, to the father of the tenant, dated *May 8th*, 1792, for the consideration *of 1000 dollars, which deed also included part of *Hare's* land, and contained full covenants.

The tenant offered to prove, that he had erected, and made on the premises, valuable buildings and improvements, which testimony was objected to by the demandant's counsel, and rejected by the judge. The counsel for the tenant then contended, that the demandant was entitled to recover her dower in the moiety of the farm only, and not in the whole farm; that the deed

Dower of land aliened by the husband in his lifetime is to be assigned according to the value of the land at the time of alienation, and such value may be ascertained, either, (1.) By the jury on the trial of the issue in the action of dower; or, (2.) By the sheriff on the writ of seisin; or, (3.) By a writ of inquiry founded on proper suggestions. (b)

(a) Vide *McClung v. Ross*, 5 *Wheat.* 116.

(b) Vide *Coates v. Cherner*, 1 *Coven.* 460.

from *J. and C. Dolf*, with full covenants, was evidence of seisin in *J.* of a moiety only, and that the demandant was estopped by the deed from claiming dower in more than a moiety. The judge charged the jury that the demandant was entitled to recover her dower in the whole farm; and the jury found a verdict for the demandant generally, and that *J. Dolf* aliened the premises on the 8th of *May*, 1792.

The tenant moved for a new trial, and the cause was submitted to the Court without argument.

Per Curiam. This case is very obscurely drawn, and it is a little difficult to ascertain the facts necessary to decide one of the points which appears to have been made upon the trial, to wit, in what part of the farm the demandant had a right to recover dower. The better conclusion from the case is, that what is meant by the *whole* farm is the 150 acres purchased by *Jonathan Dolf*, the late husband of the demandant, and his brother *Charles*; and that the defendant is in possession only of one half of that farm, being the moiety which, on a division between *Charles* and *Jonathan*, fell to the latter; and the only difficulty that appears to be created is, that when *Jonathan* conveyed his part to the defendant, *Charles* also joined with him in the deed; from which circumstance it is contended, on the part of the defendant, that *Charles* and *Jonathan* are to be deemed tenants in common of the land so conveyed to the defendant, and the widow only entitled to dower in the moiety belonging to *Jonathan*. If this be the correct construction of the case, there can be little doubt that the demandant is entitled to dower in the whole of the 75 acres which it is supposed the deed contains. This deed might be *prima facie* evidence that *Charles* and *Jonathan* held as tenants in common; but the proof is abundant to show that such was not the fact, but that *Jonathan* had held and enjoyed the whole, in his own right, and *Charles* must have been joined in the deed for greater caution. The manner in which *Jonathan* used and occupied the land, and the defendant's purchasing it of him exclusively, are sufficient, within the decisions of this Court, to establish a seisin in *Jonathan*. (1 *Cuins*, 185. 2 *Johns. Rep.* 119.)

The next question presented by the case is, whether, in this action, the defendant could be admitted to show that he had made valuable improvements upon the land. This is a case where the land in which dower is claimed had been aliened by the husband in his lifetime, and, therefore, coming within the statute, which provides that dower of any lands sold by the husband shall be according to the *value* of the lands, exclusive of the improvements made since the sale. (1 *N. R. L.* 60.) It has been settled by this Court, that dower is to be taken according to the value of the land at the time of alienation. (2 *Johns. Rep.* 484. 11 *Johns. Rep.* 510.) But in what manner, and at what time, that value is to be ascertained, has not been

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decided. It is barely hinted at in the case of *Humphrey v. Phinney*, (2 Johns. Rep. 484.) and the books do not furnish us with much light on the subject. As it is an inquiry growing, in some measure, out of the statute, the Court has an unquestionable right to adopt such practice as shall seem most expedient. This value can only be ascertained in one of three ways; either by the jury upon the trial of the issue, or by the sheriff on the writ of seisin, or by a writ of inquiry founded on proper suggestions; either of which would probably be unexceptionable. But in this case, as the issues have been already tried, recourse must be had to one of the two latter modes above suggested.

Judgment accordingly.

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*AMORY and others against M'GREGOR.

Goods shipped, contrary to the non-intercourse law of the United States, were forfeited immediately, and the owner's property devested by the act of shipment.

But goods shipped in Great Britain, after the declaration of war, were not forfeited by the non-intercourse act, which was virtually repealed by the declaration of war.

Trading with an enemy's country is unlawful; but a citizen or subject of one belligerent may

THIS was an action of *assumpsit*, on a contract for the transportation of goods, on board the ship *Indian Hunter*, from *Liverpool* to *New-Orleans*.

The *Indian Hunter* was an *American* ship, owned by an *American* citizen, residing in *New-York*, and was chartered by the defendant, a citizen of the *United States*, then residing and trading in *Liverpool*. *William Maitland & Co.*, of *Liverpool*, (a firm consisting of two persons, both naturalized citizens of the *United States*, one of whom resided in *Liverpool*, the other in *New-York*), as agents for the plaintiffs, who were citizens of the *United States*, resident in *New-Orleans*, shipped on board the *Indian Hunter*, on account of the plaintiffs, nine trunks and one bale of dry goods, and 127 crates of earthenware, being articles of the produce and manufacture of *Great Britain*, to be carried from *Liverpool*, and delivered to the plaintiffs at *New-Orleans*. Previous to the shipment of the goods, war was declared by the *United States* against *Great Britain*; but the fact was not known in *Liverpool* until a day or two after they were shipped, in consequence of which an application was made by the persons interested in the vessel and cargo, for a license

withdraw his property from the country of the other belligerent, provided he does it within a reasonable time after the declaration of war, and does not himself go to the enemy's country for that purpose. (a)

Where goods were shipped in *Great Britain*, after the declaration of war, to be sent to the *United States*, on account of an *American* citizen, and the agent of the charterer of the ship procured the vessel and cargo to be captured as prize of war by a *British* cruiser, and libelled in the Vice Admiralty Court in *New-Providene*, and the cargo, of which the goods in question were part, were claimed by the agent of the charterer, and various other persons, who, in their petitions, alleged, that, if it were transported to the *United States*, it would be forfeited, under the non-intercourse law; it was held, that the goods were lost by the act of the defendant, the charterer of the vessel, who was liable on the bill of lading; the shipment, under the circumstances, not being illegal, as a trade with an enemy, and if the non-intercourse act were still to be deemed in force, there could be no doubt that the forfeiture would have been remitted, under the act of Congress, of January 2d, 1813; but, as the defendant had not acted fraudulently, interest was not allowed to be recovered on the value of the goods.

In an action for the non-delivery of goods, pursuant to a contract of affreightment, the measure of damages is the value of the goods at the port of destination.

(a) Vide *Griswold v. Waddington*, 16 Johns. Rep. 438. S. C. infra, 87.

from the *British* government, to protect the property from capture by *British* cruisers. A license was granted, and the vessel sailed with it on board, on the 25th of *July*, 1812, for **New-Orleans*. On the 19th of *August*, she was captured by a *British* privateer, and taken into *New-Providence*; but, in consequence of the license, was released by the captors. When about leaving *New-Providence*, to proceed on the voyage, she was arrested by a process issuing out of the Court of Admiralty, which was obtained upon the petition of *Peter M'Gregor*, who sailed on board the vessel, and represented himself to be the agent of the defendant, and which stated, that in consequence of the release of the ship, the master was about to proceed with the ship and cargo to *New-Orleans*, where they would be seized by the *American* government, and forfeited, as importing her cargo contrary to the laws of the *United States*, then in force, and that the goods would thereby be lost to the owners, or underwriters thereon, who were *British* subjects. The master of the ship, however, put in a claim, and the petition was dismissed.

The *Indian Hunter* was then, at the request of *P. M'Gregor*, and one *Steuart*, who was also on board the ship when she sailed from *Liverpool*, and was proceeding with her to *New-Orleans*, as the agent and consignee of the defendant, captured by Captain *Ross*, of the *British* public ship *Rhodian*, as prize of war, on their giving a bond to *Ross* for his indemnity. The vessel and cargo were libelled in the Vice-Admiralty Court, and an unelivery of the cargo was made, by the order of the Court, on the petition of *P. M'Gregor*. Claims were filed by *P. M'Gregor*, and other persons residing in *New-Providence*, for different parts of the cargo; and, among others, one *Miller*, of *New-Providence*, a partner in the firm of *Miller, Craigie, & Co.*, claimed the goods in question, as the property of *W. Maitland & Co.*, but it did not appear that *Miller*, or his partners, had any authority from them, or were in any wise their agents. It was alleged, in the several claims, that if the goods were transported to *New-Orleans*, they would be seized and forfeited, for being imported contrary to the laws of the *United States*, then in force; and in proof of this allegation, the claimants adduced a copy of a circular letter from *Mr. Gallatin*, then secretary of the treasury, to the collectors of the customs of the *United States*, in which he says, "The non-importation act, being *still in force, must, in every respect, be carried into effect. It is your duty to seize and libel *British* merchandise, in whatever manner, or by whomsoever it may be brought or sent into the *United States*, with the exception only of property captured, &c. In the cases which, from peculiar circumstances, may be entitled to relief, this can be granted only by a special act of Congress, or upon application for a remission of the forfeiture, &c." A decree was pronounced in favor of the claimants, and the goods in question were delivered to *Miller, Craigie, & Co.*, who

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sold the same for the net sum of 1652*l.* 11*s.* 11*d.* sterling, which was remitted, by consent of both parties, to *Martland & Co.*, who now hold the same for whom it may concern, without prejudice to the rights of either party. The jury found a verdict for the plaintiffs for 23,505 dollars and 2 cents, being the amount of the invoice price of the goods, adding 80 per cent., the profit which they would have sold for at *New-Orleans*, and interest, subject to the opinion of the Court, who, if they thought the plaintiffs entitled to recover, were to state the principles by which the amount of the recovery was to be ascertained, and judgment was to be entered accordingly.

D. B. Ogden, for the plaintiffs. It is admitted, that the defendant was bound, by the bill of lading, to deliver the goods of the plaintiffs at *New-Orleans*; and the question is, whether the plaintiffs are now entitled to recover damages for the non-delivery of them. It will be said, that the voyage was illegal; but the defendant knew of that illegality, and the Court will not, unless compelled by some rigid principle of law, permit such a defence to avail him. By the act of congress, called the non-intercourse act, (*L. U. S.* vol. 9. p. 243. 248. 10th Cong. sess. 2. ch. 91.) all goods imported into the *United States*, contrary to the provisions of that act, are declared to be forfeited; and if goods are put on board of any ship, &c., with intention to import the same into the *United States*, contrary to the true intent and meaning of the act, &c., they are to be forfeited. In order to judge of the *intent*, the Court must look into the circumstances of the case. By the act of the second of *March*, 1811, *(11th Cong. sess. 2. ch. 96. s. 2.) Congress declared, that in case *Great Britain* should so revoke or modify her edicts, (orders in council,) as to cease to violate the commerce of the *United States*, &c., the non-intercourse act, as regarded *Great Britain*, should cease. Now, before the goods in question were shipped, the orders in council were revoked, and the plaintiffs, with perfect good faith, put the goods on board of the ship, with a well-grounded belief, that the non-intercourse act would cease to operate, before their arrival in the *United States*. They were not put on board with any intent to violate the act of Congress.

Again; it will be said, that this was a contract, or trading with the enemy, during war, and, therefore, illegal. But this was an *American* ship, owned by citizens of the *United States*, and the goods were actually laden on board, before any knowledge of war. Both parties to the contract are *American* citizens; and the goods were placed under the flag of the *United States*, before the declaration of war was known in *Liverpool*. It was not, therefore, a trading with an enemy. Besides, an *American* citizen, who happens to be in the country of the enemy when war intervenes, has a right to withdraw himself with his effects, within a reasonable time. This right was not denied

by the Supreme Court of the *United States* in the case of the *St. Lawrence*, (9 *Cranch*, 120.) in which this defendant was the claimant. It would be strange, indeed, if this were not the case. Why is it unlawful to trade with an enemy? Because it adds to his resources. Does this reason apply to the case of a person's withdrawing himself, with all his funds, from the enemy's power, as soon as the war is known? Can it be his duty to remain in the enemy's country, with his property, to the end of the war? In the case of the *Thomas Gibbons*, (8 *Cranch*, 424.) the Supreme Court of the *United States* decided, that a shipment from *Great Britain*, made even after a knowledge of the war, was to be considered as having been made in consequence of the repeal of the orders in council, if made so soon as to afford a reasonable presumption that the knowledge of that repeal would induce a suspension of hostilities on the part of the *United States*.

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*It may, perhaps, be objected, that the *Indian Hunter* had a *British* license on board. It is, however, nothing more than a permit for *American* citizens to return to their own country, with their property, unmolested. And the president of the *United States*, in his instructions of the 23th of *August*, 1812, to the commanders of our ships of war, directs that such vessels were not to be molested; and the capture of an *American* vessel sailing from *England*, in *August*, 1812, in consequence of the repeal of the orders in council, contrary to the president's instructions, has been decided to be illegal. (*The Mary*, 8 *Cranch*, 323. *S. C.* 9 *Cranch*, 126.)

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Did, then, any thing occur during the voyage to excuse the non-delivery of the goods pursuant to the contract? As a common carrier, the defendant must be liable for the non-delivery, unless prevented by the act of God, or a public enemy. For a failure or loss arising from any other cause, he must be responsible. The defendant could not be justified for placing the property in the hands of the enemy, from a belief, however strong and well founded, that it would be seized as forfeited to the *United States*, on its arrival at *New-Orleans*. If trading with an enemy be illegal, such an act must be equally so. Besides, there was better reason to suppose, that if the property should be seized, it would, under the circumstances of the case, be released; and we find, afterwards, that an act of Congress was passed, *January 2*, 1813, authorizing the secretary of the treasury to remit all forfeitures and penalties as to property so circumstanced. Whether *M. & S.* were the agents of the defendant or not can make no difference; the defendant is answerable for their interference. (*Van Omeron v. Dowick*, 2 *Campb.* 42. *Reid v. Darby*, 10 *East*, 143. *Id.* 373. *Hunter v. Prinsep*.)

As to the measure of damages, we contend it ought to be the value of the goods at *New-Orleans*, or 80 per cent. added to the invoice price.

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J. T. Irving and Colden, contra. 1. There can be no doubt of the intention of Congress rigidly to enforce the *non-intercourse acts*. A brief history of those acts is to be found in 2 *Wheaton's Rep.* 277. It was illegal for the parties *to enter into any contract in violation of those acts. Where a contract is entered into, the execution of which will violate the laws of the country, such contract is void. If illegal and void in its inception, every subsequent step towards the performance of it must be equally unlawful. All contracts and agreements contrary to statute are void. (1 *Fonbl. Eq.* b. 1. ch. 4. s. 4. n. 9. 1 *Comyn on Cont.* 30. 4 *Dallas*, 269. 298. 308. 342. 1 *Binney's Rep.* 110. *Cowp.* 341. 3 *Term Rep.* 454. 1 *Bos. & Pull.* 551. 5 *Term Rep.* 599. 2 *Lev.* 174. 2 *Hen. Bl.* 379. 2 *Wils.* 133. 1 *P. Wms.* 192.) Whatever may have been the intent of the parties, the bringing the goods into the *United States* was manifestly against law. The president's proclamation was evidence merely that the acts ceased to be in force, and until the proclamation was made, they must continue in full operation. The shipment of the goods, therefore, being illegal, they were, *ipso facto*, forfeited to the *United States*. (*Fontaine v. Phoenix Ins. Co.* 11 *Johns. Rep.* 300.)

2. This was a contract between enemies during war. The plaintiffs were citizens of the *United States* residing at *New-Orleans*, and M'Gregor was a naturalized citizen, domiciled at *Liverpool*, and carrying on trade in the enemy's country, and, therefore, to be regarded as an enemy. (3 *Rob. Adm. Rep.* 22, 23. 25. 4 *Rob. Adm. Rep.* 136. *Chitty's L. of N.* 25. 38. 40. 1 *Rob. Adm. Rep.* 102. 8 *Term Rep.* 31. 561. 4 *Rob.* 232.) The moment that war was declared, it was unlawful for the parties to contract, or to proceed in the execution of a contract already made. Contracts made before war are suspended by it, and may be enforced after its termination; but contracts with an enemy during war are absolutely void. After a declaration of war, an *American* citizen cannot withdraw himself, with *his property*, without the permission of his government. That principle applies only to neutrals, and they must withdraw without delay; otherwise, by a residence in the enemy's country, they will lose their neutral character. (*The Rapid*, 1 *Gallis's Rep.* 295. S. C. affirmed on appeal. 8 *Cranch*, 155. 200. *Pott v. Bell*, 8 *Term Rep.* 599. *The Mary, Vischer*, 1 *Gallis*, 620. S. C. on appeal, 8 *Cranch*, 388. 4 *Rob. Adm.* 195. 202. 5 *Rob.* 141. *The Francis, Dunham & *Randolph*, claimants, 1 *Gallis*, 445. S. C. affirmed on appeal, 8 *Cranch*, 354.) In the case of the *Francis, Story, J.*, says, "A state of war puts an end to all executory contracts between the citizens of the different countries. Whatever contract remains *in fieri* is either suspended or dissolved, *flagrante bello*;" and he puts a case, as a familiar instance, of the contract of charter-party, as being dissolved by the breaking out of war. In the case of the *Rapid*, the same learned judge lays down the principle, as

clear and well-settled, that *all trade* with the enemy, unless with the permission of the sovereign, is interdicted, and subjects the property engaged in it to confiscation. War puts every individual of the respective governments, as well as the governments themselves, in a state of hostility with each other." Again; having a *British license* is illegal, and having an *American license* cannot neutralize that illegal act; nor does the act of Congress, remitting the penalties or forfeitures which had arisen, render that legal which was unlawful in its inception.

3. The capture at *New-Providence* was a peril excepted in the bill of lading; it was a *vis major*, which excused the non-delivery of the goods.

As to the *quantum* of damages, the true measure is the invoice price of the goods. (*Smith v. Richardson*, 3 *Caines*, 219. *Bridge v. Austin*, 4 *Mass. Rep.* 115.)

S. Jones, jun., in reply. 1. It is said the contract was illegal; (1.) because it was a violation of the non-intercourse act; and (2.) because it was a trading with an enemy, war having intervened. As it regards the citizens of the *United States*, the non-intercourse act, and the declaration of war, cannot both be enforced at the same time. The one must be merged in the other. War dissolves all duties and obligations existing between the two countries and their citizens, who become mutual enemies. The one is a municipal, the other a public law. The consequences, also, are very different. By the non-intercourse act, the property seized for a violation of the act is forfeited, *ipso facto*, to the *United States*. By the law of nations, the property taken, *jure belli*, belongs to the captor. If the act of Congress is deemed *to be in force against *Great Britain*, after the declaration of war, it would produce great inconsistency. In the case of the *Rapid*, *Story, J.*, intimated his opinion to be that the non-importation act was swallowed up in the more extensive operations of the law of war. The same opinion was expressed by him in the S. C. of the *United States*, in the case of the *Sally Porter*, (8 *Cranch*, 332.) The circular letter of the secretary of the treasury, it is true, holds out a different opinion; but the S. C. of the *United States* have established the law. The act remained in force only as to neutrals; and that, perhaps, was the reason why the president of the *United States* did not issue his proclamation on the subject. At all events, as between *Great Britain* and the *United States*, the act was a dead letter.

The second section of the act of the 2d of *March*, 1811, (11th Cong. sess. 3. ch. 96.) declares, that in case *Great Britain* should revoke or modify her orders in council, &c., the fact should be declared by the proclamation of the president, and the restrictions, &c., of the non-intercourse act, should then cease. *Great Britain* having absolutely revoked her orders in council, the non-intercourse act was substantially at an end. All that was wanting was legal evidence of the fact, that is, the president's proclamation.

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Though the president thought proper to withhold that evidence, yet the state of things produced by the revocation of the orders in council amounted, at least, to a license by government to import from *Great Britain*. In the *Mary and Susan*, (1 *Wheat. Rep.* 25. 45.) the S. C. of the *United States* say, "It is well known that the continuance of the laws of non-intercourse were considered as depending on the continuance of the orders in council." In the case of the *Thomas Gibbons*, (8 *Cranch*, 421.) and the *Mary, Stafford*, (9 *Cranch*, 126.) the shipping of the goods, in consequence of the revocation of the orders in council, was held to be excusable. The S. C. of the *United States* considered the act of the 2d of *March*, 1811, as tantamount to a license. A stronger case cannot be imagined of a person honestly acting on the faith of government. Indeed, the act of Congress, passed *January* 2, 1813, (12th Cong. sess. 2. ch. 149.) remitting the penalties and forfeitures under the non-intercourse act, virtually declares, *that importations from *Great Britain*, in consequence of the repeal of the orders in council, and before the war was known to exist, being made on the faith of government, were not wrongfully made, or in violation of law.

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2. It is objected, that this contract was a trading with the enemy, and, therefore, unlawful and void. But we contend that this was not a trading, but a mere withdrawing, by an *American* citizen, with his goods, from the enemy's country. Unless the party has actually traded, or, by delaying his departure, has been guilty of fault, he may lawfully withdraw himself and his property. He cannot, it is true, negotiate with the enemy; but, if he seizes the earliest opportunity to escape with his property, he cannot be considered as violating his duty, or committing an unlawful act. If, by the general law of nations, a citizen of one country, who happens to be in another, on the breaking out of a war, has a reasonable time to withdraw himself, he may, if not prevented by the enemy, take his funds with him. By the act of Congress, passed the 6th of *July*, 1812, after the commencement of the war, (12th Cong. sess. 1. ch. 129. s. 6.) *British* subjects were allowed six months to withdraw their property from the *United States*. In the *Juffrow Catharina*, (5 *Rob.* 144.) Sir *William Scott*, though he asserts the general rule, that there ought to be a license from the government, yet, where the party had ordered goods to be sent from the enemy's country, before the war, which he had no opportunity to countermand, after the war, he ordered the goods to be restored to the claimant. So, in the *Madonna Delle Grazie* (4 *Rob.* 195.) the special circumstances of the case were deemed a sufficient excuse for not having a license. The cases cited on the other side do not apply. In the leading case, (the *Rapid*,) Mr. *Harrison*, after the war, went from *Eastport* to an island within the territory of the enemy, to obtain his goods. An involuntary act, though within the letter of the law, is not to be

so construed as to subject the party to the penalty of the law. (*Jenks v. Hallett*, 1 *Caines's Cases in Error*, 43.) In the present case, there was not only a constructive license, arising from the act of Congress, and the revocation of the *orders in council, but an express license, in the president's instructions of the 23th of August, 1812.

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The whole current of authorities is in favor of the claims of *American* citizens, under such circumstances; and on this principle have the Admiralty Courts of the *United States* proceeded in the acquittals in favor of such claims.

As to the objection of the vessel's having a *British* license, we admit, that, for any other purpose than that of returning home with his property, it would be unlawful for an *American* citizen to take it. But where it is merely for his protection on his way home, and not for the purposes of trade, it cannot have the effect to destroy his *American* character. If there could be any doubt of the *intention*, or the *bona fides* of this transaction, that was a question for the jury.

Again; if the president's instructions permitted the importation into the *United States*, the defendant cannot allege any illegality, as an excuse for the non-delivery of the goods. Whether they would be seized or not, on their arrival in this country, was a question which concerned the plaintiffs only. If the defendant had a right to refuse to proceed to the *United States*, then it was his duty to return back to his port of departure. Instead of doing this, he sells the property in the enemy's port; and was thus guilty of an act of illegality, the consequences of which he seeks to throw on the plaintiffs. Under the circumstances of the case, it was his duty to have come to the *United States*, and justified his conduct before the tribunals of this country.

THOMPSON, Ch. J., delivered the opinion of the Court.

The first question that arises is, whether this shipment was not made contrary to the non-intercourse act, so that the goods were thereby forfeited, and the plaintiff's title gone. If the non-intercourse law was in full force and operation at the time of the shipment, I do not see why the principles which governed the case of *Fontaine v. The Phoenix Insurance Company*, (11 *Johns. Rep.* 293.) would not apply. The forfeiture was incurred by the act of putting the goods on board, with intent to import the same into the **United States*; and according to the principle adopted in that case, the owner loses his right to the property immediately on the commission of the act which produces the forfeiture. There is, however, a distinction between the two cases. Here the circumstances may warrant the conclusion, that the shipment was made, under an impression and belief, that the repeal of the orders in council would terminate the differences between the two nations, and that the non-intercourse act would not be enforced. And the subsequent act of

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the 2d of *January*, 1813, shows the reasonableness of such opinion, by remitting the forfeiture, in cases where the shipment was made under such belief. But it has been decided, in the Supreme Court of the *United States*, that the declaration of war virtually repealed and annulled the non-intercourse act, as between us and *Great Britain*. In the case of the *Sally*, (8 *Cranch*, 384.) the Court say, the municipal forfeiture, under the non-intercourse act, was absorbed in the more general operation of the law of war. The property of an enemy seems hardly to be within the purview of mere municipal regulations, but is confiscable under the *jus gentium*. If, by the declaration of war, on the 18th of *June*, 1812, the non-intercourse act ceased to be in force, there was nothing making it unlawful for the plaintiffs to import the goods in question, except the existence of the war itself. The question is then presented, as to the right of an *American* citizen, at the breaking out of war, to withdraw his goods from the enemy's country. Whether these goods were liable to *British* capture, is not the question before us. This branch of the defence is placed on the ground, that it was an illegal act, on the part of the plaintiffs, to withdraw these goods; and that, therefore, a Court of justice will not enforce any contract growing out of such illegal conduct. That all trading with an enemy is illegal, is a general and well-settled rule. The principle is recognized and sanctioned as well by the common law as by the maritime codes of all *European* nations. (8 *Term Rep.* 554.) It is a wise and salutary rule; but it would require the most direct and controlling authority, to satisfy my mind, that the mere act of withdrawing goods from the enemy's country, at the breaking out of a war, *comes within the reason or policy of the rule; and no case has fallen under my observation, that has pressed the principle thus far. Several cases, in the Supreme Court of the *United States*, have been referred to, as containing that doctrine; but, on examination, they will not be found to support it. The case of the *Rapid*, (8 *Cranch*, 155.) has been relied on, as one of the strongest. But that case was essentially different from the present, and decided upon a very distinct principle. *Harrison*, the claimant, who was an *American* citizen, had purchased a quantity of *English* goods, before the declaration of war, and deposited them on a small island belonging to the *English*, near the line between the *United States* and *Nova Scotia*; and after the declaration of war, he sent a vessel, licensed and enrolled for the cod fishery, and brought the goods away, which, on their return, were captured by an *American* privateer, and condemned, in the Circuit Court of *Massachusetts*, for trading with the enemy. On appeal, this sentence was affirmed. Judge *Johnson*, in delivering the opinion of the Court, expressly waives giving any opinion upon the point now under consideration, although in very strong and emphatic language, he interdicts all intercourse with the enemy. In a state of war, he says, nation is known to nation only by

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their armed exterior, each threatening the other with conquest or annihilation. The individuals, who compose the belligerent states, exist, as to each other, in a state of utter occlusion. In war, every individual of one nation must acknowledge every individual of the other nation as his own enemy. Trading, says he, does not consist in negotiation, or contract, but the object, policy, and spirit of the rule is, to cut off all communication, or actual locomotive intercourse, between individuals of the belligerent states. Contract has no connection with the offence. *Intercourse, inconsistent with actual hostility*, is the offence against which the operation of the rule is directed. But, after thus narrowing all intercourse, he says, whether, on the breaking out of a war, the citizen has a right to remove to his own country, *with his property*, is not the question before the Court. *The claimant had no right to leave the United States, for the purpose of bringing home his property from an enemy's country.* This was the point on which the decision turned. So, again, in the case of the *St. Lawrence*, (8 *Cranch*, 434.) the Court say they do not mean to decide on the right of an *American* citizen, having funds in *England*, to withdraw them, after a declaration of war, or as to the latitude which he may be allowed in the exercise of such a right, if it exists. That Judge *Story* did not mean to be understood as deciding this question, in the case of the *Rapid*, is evident from what fell from him in the case of the *St. Lawrence*, when again before the Court; (9 *Cranch*, 121.) he says, that it is not the intention of the Court to express any opinion, as to the right of an *American* citizen, on the breaking out of hostilities, to withdraw his property, purchased before the war, from an enemy's country. Admitting such a right to exist, it should be exercised with due diligence, and within a reasonable time after the knowledge of hostilities.

Thus it will be seen, that this question never has been decided in the Supreme Court of the *United States*. And, from the guarded and cautious manner in which that Court has reserved itself, upon this particular question, there is reason to conclude, that when it is distinctly presented, it will be considered as not coming within the policy of the rule, that renders all trading or intercourse with the enemy illegal.

In *Hallet & Bowne v. Jenks*, (3 *Cranch*, 219.) the question before the Court involved the inquiry, as to what circumstances might excuse a trading, without incurring the penalties of the non-intercourse act of 1793. Ch. J. *Marshall*, in delivering the opinion of the Court, observes, that even if an *actual and general war* had existed between this country and *France*, and the plaintiff had been driven into a *French* port, a part of his cargo seized, and he had been permitted to sell the residue, and purchase a new cargo, it would not have been deemed *such a traffic* with the enemy, as would vitiate the policy upon such new cargo. According to this opinion, an actual trading with the enemy may, under such circumstances, be deemed lawful. Inde

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pendent, however, of this general question, the withdrawing of the goods in question, may very fairly be considered as falling *within the principle settled by the Supreme Court of the *United States*, in the case of the *Thomas Gibbons*; (8 *Cranch*, 421.) It was there held, that a shipment made, even after a knowledge of the war, may well be deemed to have been made in consequence of the repeal of the orders in council, if made within so early a period, as would leave a reasonable presumption, that the knowledge of that repeal would induce a suspension of hostilities on the part of the *United States*; and that Congress had acted upon that principle, by the act of the 2d of *January*, 1813, (ch. 149.) and fixed the time, (15 *Sept.* 1812,) before which shipments might be reasonably made, upon the faith of that presumption. The same doctrine is, again, recognized, and more liberally applied, in the case of the *Mary*. (9 *Cranch*, 147.) The shipment, in the case now before the Court, was on the 21st of *July*, and before the declaration of war was known in *England*. From this view of the case, and the law applicable to it, we are satisfied, that withdrawing the goods, under such circumstances, could not be considered an illegal act.

The next inquiry is, whether any thing, afterwards, occurred to exonerate the defendant from responsibility upon the bill of lading; and we cannot perceive that there has. There can be no doubt, that the admiralty proceedings against the property at *New-Providence*, after the first release, were by the procurement of the agents of the defendant. The case states that the process was procured by *Peter M'Gregor*, who sailed on board the vessel from *Liverpool*, who was the nephew of the defendant, and represented himself as his agent, on the suggestion in his petition, that, if the goods were brought into the *United States*, they would be seized as imported contrary to law, and would be lost to the owners and underwriters, who were, as he alleged, *British* subjects. But, upon claim and answer, put in by the master, the petition was dismissed, and the vessel and cargo again liberated; and the ship being about to sail, she was again stopped by a *British* armed vessel, by the solicitation and procurement of the same *Peter M'Gregor*, and one *William Stewart*, who was on board the ship, and proceeding to *New-Orleans* with her as the agent and consignee of the defendant, they giving the captain of the *British* ship *an indemnity for such seizure. The ship and cargo were then libelled, and claims interposed, by different persons, for different parts of the cargo; and the goods in question were claimed as the property of *Maitland & Co.* The claimants all alleged, that if the goods were transported to *New-Orleans*, they would be seized and forfeited, as imported contrary to law; and, in support of such allegation, produced Mr. *Gallatin's* letter of the 26th of *August*, 1812, giving instructions to the collectors on that subject. A decree was then pronounced, ordering the goods to be given up to the claimants, and they were sold, and the proceeds dis-

posed of as has been stated. There is no pretence, that the persons who represented themselves to be the agents of the defendant, and who acted as such, were not so in fact; and if so, he must be answerable for their acts. Nor is it pretended that the goods in question belonged to *Maitland & Co.* All the representation on that subject was a mere cover to get hold of the property, which, it was supposed, would be seized and forfeited, if sent on to *New-Orleans*. The goods have, therefore, been lost by the act of the defendant; for if they had gone on, and the non-intercourse act had been considered in force, there can be no doubt that, under the act of the 2d of *January*, 1813, the forfeiture would have been remitted; for the shipment was made within the time limited by that act, and under circumstances bringing the case expressly within its provisions.

The only remaining question is, as to the rule of damages, by which the amount of the recovery is to be regulated. This, we think, ought to be the net value of the goods at *New-Orleans*, the port of delivery. That was the rule adopted by this Court, in the case of *Watkinson v. Laughton*, (8 *Johns. Rep.* 213.)

Whether interest ought to be allowed or not, depends, principally, upon the light in which the defendant's conduct, or that of his agents, is viewed. The jury might have given interest, by way of damages; and the verdict being subject to the opinion of the Court, we are substituted in the place of the jury. If there was any fraud or gross misconduct attending the transaction, interest ought to be allowed. *But we are inclined to think the conduct of the defendant's agents ought not to be stamped with so odious a character. They appear to have acted under an impression, that the goods, if sent on to *New-Orleans*, would inevitably have been seized and forfeited, and entirely lost to the owners, and that what they did would promote their interest. So that, upon the whole, we think interest ought not to be allowed. The verdict must, accordingly, be reduced; and the amount of damages liquidated according to the rule thus laid down.

Judgment for the plaintiffs.

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OSTRANDER *against* BROWN AND STAFFORD.

Where goods were put on board of the defendant's vessel to be carried to *Albany*, and, on arriving there, were, by the defendant's direction, put on the wharf, it was held that this was not a delivery to the consignee, and that evidence of a usage to deliver goods in this manner was

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immaterial, but that the defendant was liable in an action of *trover* for such part of the goods as was not actually delivered to the consignee. (a)

And although the goods were taken away without the direction of the consignee, by a cartman usually or always employed to transport his goods, and the greater part actually received by the consignee, this was held not to be evidence of the delivery of the part alleged to be lost, as he was not to be deemed the general agent of the consignee for receiving his goods.

A carrier is not justified, by the inability or refusal of the consignee to receive the goods, in leaving them exposed on a wharf, but it is his duty to secure them for the owner. (b)

IN error to the Mayor's Court of the city of *Albany*.

This was an action of *trover* for a box of tea, brought by the defendants in error against the plaintiff in error. At the trial before the recorder of *Albany*, in *September*, 1816, the plaintiffs below proved that, in the spring of 1815, they shipped, with a number of other articles, on board the sloop *George*, of which the defendant below was master, two chests of tea, to be carried to *Albany*, and delivered to *Mounsey & Olmstead*, of that city; and it was testified by *Hyde* a clerk of *Mounsey & Olmstead*, that the *George* arrived in *Albany* about the 22d of *May*, and that all the goods were received, except one chest of tea.

Robert Brown, a witness for the defendant below, testified, that, soon after the sloop arrived at *Albany*, one of the firm of *Mounsey & Olmstead* came on board and put his name *opposite to the entry of the plaintiff's goods on the sloop's freight list; but it was sworn by *Hyde*, that the name on the freight list was not the hand-writing of either of the consignees. *Brown* further stated, that the goods of the plaintiffs were put on the dock together, and were taken away by one *Carle*, a cartman, who was the general cartman of *Mounsey & Olmstead*, for carrying goods from the different sloops to their store.

The defendant offered to prove that it was customary in the city of *Albany* for the captains of vessels freighted with goods for merchants in that place, to deliver them by putting them upon the dock, and giving notice to the consignees, who usually had cartmen to convey them to their stores, and that such delivery, with notice, was, by custom, considered a good delivery. The counsel for the plaintiffs objected to this testimony, and it was overruled. The plaintiffs then offered *Carle*, the cartman, as a witness, who was objected to on account of interest, but was admitted by the Court. *Carle* testified that he had often carried goods from the sloops for *Mounsey & Olmstead*; that, at the time when the chest of tea was lost, after the sloop had arrived at the dock, he saw one *Keeler*, who told him that there were some goods on board for *Mounsey & Olmstead*, and that he must go and take them away; that he carried one load one day, and another load the next, and believed that he carried all the goods of *Mounsey & Olmstead* that were shown him, to their store, who paid him for the cartage. He further testified

(a) Vide *Peckard v. Getman*, 6 Cowen, 757.

(b) *Cope v. Cordova*, 1 Rawle's Rep. 203, contra. But see the distinction there taken between the foreign and coasting trade.

that a part of the goods had, by mistake, been put into a wagon, from whence he took them. The jury found a verdict for the plaintiffs below, the defendants in error, the recorder having charged that *Carle*, under all the circumstances, was not such an agent of *Mounsey & Olmstead*, as to render a delivery to him a legal delivery.

A bill of exceptions was taken on the part of the defendant below, which was removed into this Court by writ of error.

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Foot, for the plaintiff in error, contended, (1.) That the proof offered of the usage, ought not to have been rejected. In *Smith v. Wright*, (1 *Cuines's Rep.* 43.) evidence of usage was admitted; and the Court say, that "the true test of a commercial usage is its having existed a sufficient length of time to have become generally known, and to warrant the presumption that contracts are made in reference to it." (*Rushforth v. Hadfield*, 7 *East*, 224.) In *Wardell v. Mourillyar*, (2 *Esp. N. P. Rep.* 693.) which was an action against a hoyman, for not delivering goods, Lord *Kenyon* left it to the jury to decide what was the custom, as to landing the goods at a particular wharf. And many cases are to be found in the *English* books, of evidence of usage or custom being received. (*Syeds v. Hay*, 4 *Term Rep.* 260. *Hyde v. Trent. Navig. Co.* 5 *Term Rep.* 389. 397. *Catley v. Wintringham*, *Peake's N. P. Cases*, 150. *Abbot on Ships*, 247.) The time when the liability of the carrier is to cease, depends on the custom of the particular place. (2 *Comyn on Contracts*, 329, 330.)

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2. A delivery to an agent, or servant, is a delivery to the principal. The cartman, in this case, being in the usual employment of the plaintiff, must be deemed, *pro hac vice*, his agent.

3. A delivery on the wharf, or at the dock, is, by law, a good delivery. This seems to be admitted in the case of a common carrier from port to port. (3 *Wills*. 429. 2 *Wm. Bl.* 916. 5 *Term Rep.* 389. 4 *Term Rep.* 531.)

Hale, contra. This is an action against a common carrier, who is held to very strict responsibility. Nothing but the act of God, or a public enemy, will excuse him for a non-delivery of the goods intrusted to his care. The delivery must be either to the party himself, or to some person authorized by him to receive the goods. Putting the goods, especially where they are perishable articles, on a wharf or dock, cannot be a good delivery. In the case of *Wardell v. Mourillyer*, the delivery was made to a *wharfinger*, not merely by putting them on a wharf. In *England*, a *wharfinger* is an officer or agent well known in the law, and who is responsible for the safe keeping of the goods delivered to him. (4 *Term Rep.* 260. 7 *Term Rep.* 171. 5 *Burr.* 2825.)

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*No notice was given to the consignee, in this case, of the delivery of the goods at the wharf.

PLATT, J., delivered the opinion of the Court. In a case where the *precise place of delivery* is material, it may be proper to allow evidence of a *local usage*. For instance, the usage at *Havanna* is often proved to show that some species of cargoes, such as slaves, are to be delivered at the *Moro Castle*, and that other articles are deliverable only on the wharfs in the inner harbor. But in this case, it seems to me, that the only question is, not whether the tea was delivered at the *right place*, but whether it was delivered *at all*, to *Mounsey & Olmstead*.

If it be true, that one of the consignees went on board the vessel and saw a list of the goods, (which I think is not proved,) *that* would not be evidence of a delivery. The goods were then in the hold of the vessel. The master, soon afterwards, put them on the dock, but not in the presence, nor with the knowledge, of either of the consignees. No notice was given to *Mounsey & Olmstead* that the goods were unladen, or that they had arrived. But a cartman who "had often carted for them," and who, no doubt, had often carted for fifty other persons, came, by the direction of Mr. *Keeler*, (a stranger to the plaintiffs below,) and on that day carried one load to the store of the consignees; the residue was left all night on the wharf, and the next day, the same cartman found some of them in a strange wagon, and the box of tea has not since been heard of. In truth, the only acts done by *Mounsey & Olmstead*, or their clerk, were to receive in store such articles as the cartman brought to them, and to pay him for carting them; and there is no proof that they ever had any other knowledge of the goods. The weight of evidence clearly shows that neither of them was on board the sloop.

Admitting, then, that the wharf was the place of delivery, a mere *landing* the goods on the wharf was *no delivery*. A delivery, in this case, implies mutual acts of the *carrier* and the *consignees*.

A *tender*, merely, of the goods to the consignees, without their acceptance, would not be a performance of the carrier's *duty in such a case. Suppose the consignees had been dead, or absent, or had refused to receive the goods in store, what would have been the carrier's duty? Certainly he would have no right to leave them on the wharf, or in the street, without protection. He would not be justified in abandoning the goods. He had notice that *Stafford & Brown* were the owners; and if *Mounsey & Olmstead* would not take charge of the goods as consignees, he ought to have secured them on board his vessel, or in some other place of safety; and that would have entitled him to his freight with all extra charges.

The decision of the Court below, on the question of *local usage*, was on a point which is immaterial in the case.

The second exception was, I think, properly abandoned on the argument; and the opinion of the Court below on the last point, to wit, that the cartman was not to be regarded as the general agent of the consignees, for receiving goods merely on the ground of his being often employed by them to cart goods, was undoubtedly correct. Because a merchant usually selects a cartman, and employs him exclusively in carrying goods, according to his orders, it by no means follows that such cartman is his general agent for receiving goods, without orders.

The defendants in error are, therefore, entitled to judgment

Judgment accordingly

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***MUNN against The President and Directors of the [* 44]
COMMISSION COMPANY.**

THIS was an action of *assumpsit*, on a bill of exchange, drawn by *Herman Ruggles*, in favor of *Oliver Ruggles*, or order, on *Noyes Darling*, as agent of the defendants, dated the 26th of April, 1814, at sixty days after date, for 4,500 dollars. The bill was accepted by *Darling*, as agent, and was endorsed by *Oliver Ruggles*. The plaintiff was the holder of the bill. The cause was tried before *Mr. J. Platt*, at the *New-York* sittings, in December, 1815.

By the second section of the act of April 9th, 1813, (sess. 36. c. 150.) (d) by which the defendants were constituted a corporation, it is, among other things, enacted, that the stock of the company "shall be employed solely in advancing money, when requested, on goods and articles manufactured within this state, or the *United States*, except salt manufactured within the same,

A corporation, authorized by the act of incorporation to employ their stock solely in advancing money upon goods, and the sale of such goods upon commission, may lawfully accept bills drawn on account of future consignments, or deposits of goods.

The principal is liable for the acts of a general agent, acting

within the general scope of his authority; and a third person cannot be affected by any private instructions from the principal to his agent.

But the principal is not bound by the acts of a special agent beyond his authority. (a)

A company, incorporated for the purpose of selling goods on commission, is bound by the acceptance of its general agent of a bill, drawn on the company, on account of goods, stipulated to be deposited with the company, for sale on commission.

Where a bill or note is valid, as between the drawer or maker, and the payee, so that the latter can maintain an action upon it, against the former, it is valid in the hands of an endorsee, who has discounted it at a higher rate than the legal rate of interest, and he may recover the full amount of the bill, or note, against the maker or acceptor. (b)

But the holder of a note, purchased at a discount greater than the legal rate, can only recover from his endorser the sum which he actually advanced.

A bill, or note, drawn for the purpose of being discounted, at an usurious rate of interest, and endorsed for the accommodation of the maker, or drawer, is void in its original formation. (c)

(a) Vide *Perkins v. Washington Ins. Co.* 4 Conn. Rep. 645. *Beals v. Allen*, 18 Johns. Rep. 363. *Andrews v. Kneeland*, 6 Cowen, 334.

(b) Vide *Rice v. Mather*, 3 Wendell's Rep. 62. *Brach v. Fulton Bank*, Ibid. 573. *Brown v. Dennison*, 5 Ibid. 593. *Coster v. Dilworth*, 8 Conn. Rep. 299. *Rossiter v. Rossiter*, 8 Wendell's Rep. 494. *Bank of Chamango v. Hyde*, 4 Conn. Rep. 567. *Powell v. Waters*, 17 Johns. Rep. 176. *S. C.* 8 Cowen, 670.

(c) Acc. *Bennet v. Smith*, 15 Johns. Rep. 355.

(d) 3 R. S. 550.

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and the sale of such goods and articles on commission : *Provided*, That no more than lawful interest shall be charged or received for any money so to be advanced, and that the usual mercantile commissions, with the usual charges, shall be charged or received on such sale, and that no commissions be charged or received, except upon actual sales : *And provided also*, That it shall not be lawful for the said corporation to use or employ any part of the said capital, nor any money, funds, or effects whatsoever, in the purchase or sale of any goods, wares, merchandise, or commodities whatever, other than, and except in advances in money, on *American* manufactures, and selling the same on commission as aforesaid, nor in banking, or in any moneyed operations, nor in the purchase or sale of bills of exchange, or any stock, or funds, of this state, or the *United States*, except in selling the same, when truly pledged to the said corporation, for a debt, or debts, due to the same."

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By the by-laws of the company, an agent was directed to be appointed, whose powers and duties are thus defined :—"The agent will be required to superintend, generally, the business of the company ; to make contracts, both for advances and sales, under such directions as the board may give from time to time ; to sign checks for the cash payments of the company, which are all to be countersigned by the secretary, and to countersign all obligations which may be signed by the president, with the seal of the company ; to lay before the board statements of the affairs of the company, when required, and especially at each regular monthly meeting of the directors, to give a full and particular statement of the whole business of the company." Shortly after this by-law was passed, a committee of the directors made a report, in relation to the duties of the agent, which was accepted by the board on the 17th of *May*, 1813, the most material parts of which are as follows :—"The committee do not deem it expedient to publish any proposals for the transaction of business, excepting that they will receive on consignment goods of *American* manufacture, and will make reasonable advances on the same, charging the customary commissions and expenses. They deem it expedient, however, to adopt certain rules for the guidance of the agent, who will make known such parts of them as are proper to individuals proposing to transact business with the company. 1. The agent is authorized to receive on consignment all goods of *American* manufacture, and to make advances on the same not exceeding three fourths of the market value of such goods, and requiring a receipt for the advance, with promise to refund, with interest, in case the goods should not be sold within a limited time, not exceeding one year, or should be insufficient to meet the advance. 2. The agent, with the advice of a monthly committee of two directors, may make arrangements with individuals, or manufacturing companies, for the general consignment of their manufactures. 3. The agent, with the advice of the same committee, may make reasonable ad-

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vances on shipments of *American* manufactures. 4. The agent shall not make any other appropriation of the funds of the company, without the order of the board of directors, except the current expenses of the company, and balances due for sales. 5. The agent may agree to transact business on the following terms, &c. &c. The preceding regulations are deemed to be sufficient restrictions on the agent, whose general duties are pointed out in the report made to the directors, on the 26th of *April*," (the material part of which was the by-law above stated,) "with which he is expected to comply." *Darling* was appointed the agent of the company, and was at the same time one of its directors.

At the time that the acceptance in question was made, *Herman Ruggles* gave *Darling* a receipt, stating the terms of the agreement entered into between them, and dated the 26th of *April*, 1813. This receipt was as follows:—"Received of *Noyes Darling*, agent of the Commission Company, his acceptance of my draft in favor of *Oliver Ruggles*, at sixty days from this date, for 4,500 dollars, which acceptance is wholly for my accommodation; and which I hereby agree to return to said *Noyes Darling*, to be cancelled on the 2d day of *May* next, or to pay him the amount of said acceptance, on said 2d day of *May*, and, as collateral security, for the return or payment of said acceptance, on said 2d of *May*, I have placed, and do hereby place, in the hands of said *Darling*, my three several notes of hand, &c. And I do agree, in consideration of the accommodation afforded by the Commission Company, to place in the hands of their said agent, for sale on commission, one month from the date hereof, 100 hogsheads of domestic distilled spirits." *Ruggles* neither paid the amount of the bill, nor delivered it up, nor were the spirits deposited pursuant to the agreement.

An entry of this acceptance was made in the bill book of the company by their secretary, and it was offered for discount, at the *Merchants' Bank*, where it was refused. *Ketchum*, a broker, testified, that, in *April*, 1814, he received the bill from *Oliver Ruggles* to raise money upon. The broker took the bill to *Fox & Leggett*, and offered it to them *for sale: they retained it, under the pretence that they wished to examine into the state of their funds, and in the mean time gave it to another broker, *Franklin*, who sold it to the plaintiff for 4,362 dollars 75 cents, and paid the money to *Fox & Leggett*; out of this money they paid over to *Ketchum* the amount of the bill, deducting discount at a higher rate than had been taken by the plaintiff, and so making a profit on the transaction. *Ketchum* paid over the money which he had received, to *Oliver Ruggles*. It was proved that *Darling* had accepted a number of bills, in the same manner as the one in question, which were regularly paid by the company, but there were some acceptances which were never entered in the company's books, and the funds arising from them had never come into their hands.

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Bank, and was present when the bill was offered for discount, and a few hours after caused a meeting of the directors of the company to be called, to inquire into the transaction; but, at the request of *Darling* the business was postponed. On the 2d of May, when another meeting of the company was called, there was not a sufficient number present to form a board, and the next day *Darling* absconded. The company afterwards settled and compromised acceptances of *Darling*, which had not been entered in their books, for the purpose of preserving their credit.

At the trial, *Herman* and *Oliver Ruggles* were offered by the defendants as witnesses, to prove that no rum had ever been deposited with the company, pursuant to the agreement, and that the bill was, in its inception, usurious; but they were rejected by the judge. A verdict was taken for the plaintiff, by consent, for the amount of the bill, with interest, subject to the opinion of the Court, on a case, of which such parts as appeared material are above stated.

The cause was argued, at a former term, by *Wells* and *Hoffman*, for the plaintiff, and by *T. A. Emmet*, and *D. B. Ogden*, for the defendants, on the two points raised by the counsel for the defendants, to wit. 1. That the defendants were not bound by the acceptance of the bill by *Darling*. 2. That the transaction was usurious. At the last *October* term, the Court directed a second argument, on the second point.

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**Arguments for the Plaintiff.* 1. Whatever may have been the law formerly, it is now well settled, that a corporation may be bound by a contract, made by their authorized agent, without their seal; and that an action of *assumpsit* lies against a corporation. (*Stafford v. Albany*, 6 *Johns. Rep.* 1. *Danforth v. Schoharie Turnpike Company*, 12 *Johns. Rep.* 237. 10 *Mass. Rep.* 295.) It is fully proved, by one of the witnesses, (*Jennings*), that *Darling* was the general agent of the defendants, and was in the habit of accepting bills for them, and that his acceptances had been regularly paid by the defendants. It may be said, perhaps, that the defendants, by the act for their incorporation, (sess. 36. ch. 150. s. 1, 2.) had no authority to accept bills; but were restricted to making advances of money on goods sent to them for sale. Though the *preamble* speaks of advances on the deposit of goods, yet the enacting clause is silent on that point, and the practice of the company had been different. They have not required the actual deposit of goods before making advances. The acceptance of a bill is nothing more than an agreement, in writing, to advance money on a certain day specified in the bill. It is enough, that the acceptance was in the ordinary course of the defendants' business. The object of the act was merely to give the defendants, as a corporation, the power to transact business as commission merchants. An actual deposit, or a reasonable

expectation of a deposit of goods, on a certain day, was sufficient to authorize the acceptance to advance the money.

The whole evidence goes to show that *Darling* was the *general agent* of the defendants; and he proves, also, that he acted within the scope of his authority or instructions. But whether he did so act or not, yet being the general agent of the defendants, his acts are obligatory on them. The particular instructions given to him for the regulation of his conduct may make him accountable to his principals; but the public, or third persons, are not bound to inquire into his authority; they know him only in his ostensible character as a general agent. To require that all persons dealing with such an agent should ascertain the extent of his power, would destroy all distinction between a general and *special agent, and would render it unsafe to take even a bank note, without inquiring whether the president and cashier of the bank had any authority to sign it. It is enough that the general agent acts ostensibly within the scope of his authority. This doctrine is more especially applicable to corporations, who can act only by their agents. The distinction between general and special agents is well settled in the books. (*Fenn v. Harrison*, 3 Term Rep. 757. *Whitehead v. Tuckett*, 15 East, 400. *Runquist v. Ditchell*, 3 Esp. N. P. Cas. 64, 65. *Batty v. Caswell*, 2 Johns. Rep. 48. *Gibson v. Colt*, 7 Johns. Rep. 390. *Pothier, Trait. des Oblig.* n. 79.)

Again; on principles of the *commercial law*, the acceptance is binding, whether *D.* exceeded his instructions or not. This being a negotiable paper, the plaintiff, a *bona fide* holder, is not to be affected by any fraud committed in putting it into circulation. (*Woodhull v. Holmes*, 10 Johns. Rep. 231. *Peacock v. Rhodes*, Doug. 633.) Admitting, however, that *D.* exceeded his authority, yet the defendants have recognized and adopted his acts so as to give them validity. Where a principal is informed of the acts of his agent, and does not, in a reasonable time, express his dissent, he is presumed to assent to them, and will be bound by such implied adoption. (*Cairnes v. Bleecker*, 12 Johns. Rep. 300. *Hodgson v. Davies*, 2 Camp. N. P. Cas. 530.)

2. As to the objection of *usury*. To avoid an instrument, on the ground of usury, it must be shown that it was, in its inception, founded on an usurious loan of money. (*Scott v. Brest*, 2 Term Rep. 241.) Any subsequent taint which it may, afterwards, acquire, in being negotiated between third persons, will not destroy the original contract. The original party, maker, drawer, or acceptor, cannot object that there has been a subsequent usurious contract between the endorser and endorsee. Then, was not this a valid bill in its inception? It was advanced on an hypothecation or deposit of goods by *O. Ruggles*. There was no actual or implied agreement that the acceptance should be taken or used for the purpose of raising money in the market on usury. There were 400 shares, also, deposited as collateral

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security. *O. R.* might have brought an action on the bill *against the defendants; and if *H. R.* could not, it would be on the ground only that he had engaged to return the acceptance lent to him. The term *accommodation* does not imply usury. If the bank had discounted the acceptance when it was offered for that purpose, they might have recovered the amount of the defendants. *O. R.*, the payee, put the bill in circulation. He had a right to sell or negotiate it, at any rate of discount he pleased. The defendants cannot object to such a negotiation of it. It is enough that the bill was made and issued *bona fide*, without a premium paid, or usurious agreement. The cases of *Jones v. Make*, (2 Johns. Cas. 60.) and *Wilkie v. Roosevelt*, (3 Johns. Cas. 203.) are very different from the one before the Court. There, a note was made and endorsed for the very purpose of raising money on it, at an usurious interest. It passed directly from the maker to the lender or endorsee, without having been delivered to the payee or endorser.

Again; after the bill came into the hands of the plaintiff, the defendants promised to pay it. A contract originally usurious may be made good in the hands of a *bona fide* holder, by a promise to pay him the amount. (*Stewart v. Eden*, 2 Caines's Rep. 150. *Jackson v. Henry*, 10 Johns. Rep. 185. *Cuthbert v. Haley*, 8 Term Rep. 390. *Parr v. Ellison*, 3 Esp. N. P. Cas. 210. *Prodgers v. Lugham*, 1 Sid. 133. *Ferral v. Shaen*, 1 Saund. 294.)

Arguments for the Defendants. 1. To make the acceptance binding, it must appear to have been made by the defendants in their corporate capacity, or by their agent duly authorized; and such acceptance must be within the corporate powers of the defendants. The acceptance was made for the accommodation of *H. R.*, who made no deposit of goods at the time, but merely promised, in consideration of such accommodation, to deposit them at a future time. The defendants are trustees for the stockholders, and have no right to compromise their interests by any act not clearly authorized by the act of incorporation. The preamble to the act, which is the best interpreter of the intent of the legislature, and shows its object, does not contemplate a power to enter into such a transaction. The question is not whether *the corporation made an express contract beyond its capacity, but whether an agent for them has made a contract beyond the powers of the corporation. An agent of a corporation, whether general or special, cannot do an act beyond the legal powers of the corporation. You cannot imply a power in an agent to do what the corporation itself could not have done. Where a public act of incorporation defines the powers of the corporation, or prohibits its doing certain things, every person is bound to know its powers, and whether an act done is authorized or not. Every company incorporated for a special purpose, being itself a special agent, an agent constituted by

them must have a special authority, and all persons dealing with such agent must be presumed to know the extent of his authority. (*Hayden v. Middlesex Turnpike Company*, 10 *Mass. Rep.* 397. 403. *Sewall, J.*) The delegation of authority by the company must be within its corporate powers. How does it appear that *D.* was the agent of the defendants? He must be appointed by deed, by an instrument under the corporate seal, or by some resolution or by-law of the company. No appointment under seal appears in this case. The act of incorporation gives the defendants power only to appoint agents to carry into effect the objects of the corporation, and no other; and the by-laws under which *D.* is supposed to derive his authority, did not authorize him to make this acceptance. But it is said that *D.* was in the practice of making such acceptances, and that the defendants have ratified them; but there is no evidence of a ratification of any acceptance not made on an actual deposit of goods; and the supposed adoption appears to have been made without a knowledge of the actual circumstances.

2. This bill was founded in an usurious agreement. It was originally made for the accommodation of *O. R.*, and with a view to enable him to go into the city and raise money upon it. It comes within the principle decided by the Court, in the case of *Dunham v. Day*, (13 *Johns. Rep.* 40.) If the doctrine contended for on the part of the plaintiff is to prevail, the legislature might as well repeal the act against usury, for nothing can be easier than to evade it. The declaration of Lord Mansfield, in *Floyer v. Edwards*, *(*Cowp.* 114.) "That where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute" would prove an idle saying. This was a mere accommodation bill, and after the bank had refused to discount it, *O. R.* carried it to a broker to raise money on it, at 2 1-2 per cent. per month, and the broker went to the plaintiff, and got it discounted at 1 1-2 per cent. per month. The sale of a note in the market is a mere evasion of the statute, a mere cover for an usurious loan. (*Jones v. Hake*, 2 *Johns. Cas.* 60. *Wilkie v. Roosevelt*, 3 *Johns. Cas.* 66. 206.)

Putting one's name on a note, for the mere purpose of rendering it negotiable, and to facilitate the usurious loan, is a shift and evasion of the law. But it is said, that the defendants cannot avail themselves of this subsequent usurious transaction with a third person, to avoid the payment of their acceptance. The defence may be made against any person who comes into Court with impure hands, and tainted with usury. If the endorsement for an usurious loan is void, the holder can make no title through that endorsement. If the endorsee cannot recover against his endorser, on account of the usury, how can he maintain an action against the maker or acceptor? Though the bill were *bona fide* in its origin, yet if it was endorsed to the plaintiff for an usurious consideration, he can never recover from any party, for he must derive his title through that endorsement, which is ille-

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gal and void. The bill never existed as an effective and negotiable instrument, until it was passed to the plaintiff. An *accommodation* note, or bill, has effective or legal existence only when it is transferred to a *bona fide* holder. If it is once established that the names appearing on the note were lent for accommodation, it makes no difference what is the number of endorsers, or whether the transaction assumes the shape of an acceptance or not. The form of the instrument, or the number of names on it, cannot change the real character of the transaction. The plaintiff is an usurious lender of money, not a purchaser in the market. The distinction set up, as to an innocent and *bona fide* holder, cannot avail him who is the usurer. If the instrument be originally usurious, or if the *bona fide* holder must derive his title *through an usurious endorsement, it is equally void against him.

SPENCER, J., delivered the opinion of the Court. The grounds on which the defendants resist the payment of the bill, in this case, are, 1st. That *Noyes Darling*, the defendants' agent, exceeded his authority in accepting the bill. 2d. That the bill is usurious.

This case has been twice argued, and, the last time, by the direction of the Court. The second argument has been confined to the last point, whether the bill was void for usury. The Court entertained no doubts on the first point, and the second argument has removed all doubts upon the second.

1. The defendants are a corporation, and had, it appears, duly constituted *Darling* their general agent. It has been strongly urged, that under the act incorporating this company, (sess. 36. ch. 150.) they could neither draw nor accept bills of exchange. Their power is, undoubtedly, limited. They are required to employ their stock solely in advancing money, when required, on goods and articles manufactured within the *United States*, and the sales of such goods and articles on commission. The acceptance of a bill is an engagement to pay money; and the company may agree to pay or advance money, at a future day, and they may engage to do this by the acceptance of a bill.

The contract between *Herman Ruggles*, the drawer of the bill, and *Darling*, as agent to the defendants, is, that he will accept the bill, and that collateral security shall be given by *Ruggles* for the return or payment of it; but, as a consideration for the accommodation afforded by the acceptance of the bill, he was to place in the hands of the defendants' agent 100 hogsheads of domestic distilled spirits for sale on commission, and as a further security for the acceptance. I perceive no objection arising from the act of incorporation, to the advance of money, or the acceptance of a bill, on an agreement to deposit goods or articles of domestic manufacture. The legislature have not inhibited this; nor have they required that the goods should be delivered to the company prior to their advan

ing money on them. Such a requirement *would be impolitic and embarrassing to the manufacturer and the company.

The point principally insisted on is, that the agent exceeded his particular instructions, as regards the acceptance of this bill, the *same* not having been, in fact, deposited. The by-laws of the corporation have been produced, and they certainly do not confer on the agent the power of accepting bills, on an expected delivery of goods. But it is proved that *Darling* was the general agent of the defendants, and that he was in the habit of accepting bills, which the company, afterwards, paid, under the like circumstances. It further appears, that the acceptance in question was entered in the books of the company in the usual manner of all other acceptances.

The distinction is well settled between a general and a special agent. As to the former, the principal is responsible for the acts of the agent, when acting within the general scope of his authority, and the public cannot be supposed connusant of any private instructions from the principal to the agent; but where the agency is a special and temporary one, there the principal is not bound, if the agent exceeds his employment. In *Fenn v. Harrison*, (3 Term Rep. 760.) *Ashhurst, J.*, takes the distinction stated; and he exemplifies it, by putting two cases. He says, if a person keeping livery stables, and having a horse to sell, direct his servant not to warrant, and the servant, nevertheless, warrants him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority. Again; he says, if the owner of a horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who sold the horse, and the owner would not be liable on the warranty; because the servant was not acting within the scope of his employment. In *Gibson v. Colt* and others, (7 Johns. Rep. 393.) this Court recognized the distinction between a special and general agent, as laid down in *Fenn v. Harrison*, to be founded on just and reasonable principles, with the observation, "that the limitation to the powers of a general and known agent, cannot be known, unless specially *communicated, and third persons ought not to be affected by any private instructions." The same principle was recognized by Lord *Kenyon*, in *Runquist v. Ditchell*, (3 Esp. Rep. 61.) and, again, by Lord *Ellenborough*, in *Whitehead v. Tuckett*, (15 East, 407.) It makes no difference, that the defendants were a corporation; for it is settled, that they may be bound by the acts of their agents, in the same manner as private individuals.

I abstain from mentioning several incidental facts, which go to confirm the position, that the defendants considered and treated *Darling's* acts as binding on them.

2. The second point was not free from doubt, and, as has been observed, led to the re-argument of the cause. The doubt

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in the minds of some of the judges has been removed, by a more precise ascertainment of a fact ; it was doubted, whether *Oliver Ruggles*, the payee of the bill, was not a mere *dramatis personæ* and whether he could, after the acceptance of the bill, have maintained a suit upon it. Upon a more careful examination of the case, we see no reason to doubt, that the bill, whilst in his hands, and before it was discounted by the plaintiff, at a higher rate than the legal interest, was a perfect and available bill, and that, when it became due, he could have maintained an action upon it, against either of the defendants, or *Herman Ruggles*, the drawer. This appears to the Court to be the true test, in distinguishing between a case, where the discount of a bill, at a higher premium than the legal rate of interest, will render the transaction legal, by considering it the purchase of a bill already perfect and available to the party holding it, and where it will be illegal, as a usurious loan of money. The principle is too well settled to be questioned, that a bill, free from usury, in its concoction, may be sold at a discount, by allowing the purchaser to pay less for it than it would amount to at the legal rate of interest, for the time the bill has to run. The reason is obvious : as the bill was free from usury, between the immediate parties to it, no after transaction with another person can, as respects those parties, invalidate it. And I take it to be equally clear, that if a bill, or note, be made for the purpose of raising money upon it, and it is discounted at a higher premium than the legal rate of interest, and where none of the parties whose names are on it, can, as between themselves, maintain a suit on the bill when it becomes mature, provided it had not been discounted, that then such discounting of the bill would be usurious, and the bill would be void. I have no doubt that *Herman Ruggles* could, in no event, have maintained a suit on this bill. The contract between him and *Darling* bound him either to deliver up the bill to be cancelled, long before it would become due by the terms of it, or to pay *Darling* the amount of the bill. And it would make no difference, as to the question of usury, that an attempt was made to get it discounted, at a legal rate of interest, by presenting it to a bank. Had it appeared that *Oliver Ruggles* had no interest in the bill, but had merely lent his name for the accommodation of *Herman Ruggles*, the Court have no hesitation in saying, that the plaintiff's purchase of the bill would have been usurious, and that he could not have recovered upon it ; because, until such purchase, the bill would have been mere waste paper, and it would have had no existence, or been available, until the plaintiff acquired his title, and that title, being contaminated and infecting the bill, would be invalid as against all the parties to it. (3 Johns. Cas. 69. 206. 2 Johns. Cas. 60.)

It has been said, that *Oliver Ruggles*, for aught that appears, was the holder of this bill in his own right, and could have maintained a suit to enforce its payment, when it came to maturity.

city, against the acceptor and drawer, had it never been dis-
counted by the plaintiff; and then, it follows, that the drawer
and acceptor, in a suit by the endorsee, have nothing to do
with the consideration paid for the bill, by such endorsee to the
drawer. They are bound to pay the bill; but, as respects the
payee, and first endorsee, if he be sued by his immediate en-
dorser, it will be competent for him to show the real considera-
tion paid; and if it be less than the face of the bill, and the le-
gal interest for the time the bill had to run, then he can claim
to have the difference deducted. (*Braman v. Hess*, 13 Johns.
R. p. 52.)

Judgment for the plaintiff.

*N. B. In a suit of *Munn v. Herman Ruggles*, the same
judgment was entered. And in the suit of the same plain-
tiff against *Oiver Ruggles*, a judgment was given for 4,362
dollars and 75 cents, with interest from the 28th day of
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NATHANIEL L. & GEORGE GRISWOLD *against* HENRY & JOSHUA WADDINGTON.

THIS was an action of *assumpsit*, on the *capias* in which
the defendant, *Joshua Waddington*, was taken. The cause
was tried before Mr. J. Van Ness, at the New-York sittings,
in November, 1816.

The defendant *Joshua Waddington* was an American citizen,
residing in New-York, and the defendant *Henry Waddington*,
a British subject, residing in London. The defendants had
been in partnership together, and carried on their business at
London, under the firm of *Henry Waddington & Co.*; and at
New-York, under the firm of *Joshua Waddington & Co.* The
plaintiffs were citizens of the United States, resident in New-
York, and the demand sought to be recovered in this action,
was a balance of account arising on transactions between the
plaintiffs and *Henry Waddington*, or the firm of *H. Wadding-
ton & Co.*, during the late war between this country and Great
Britain. Evidence was produced on the part of the defendants
to show that a dissolution of the partnership between them took
place on the 31st of December, 1812, anterior to the transactions
in question, but there was no proof that any public notice of
dissolution had been given, or that the fact was generally known,
or known to the plaintiffs. The plaintiffs, to prove the exist-
ence of a partnership, produced an affidavit made by J. Wad-

A partnership
between per-
sons residing in
two different
countries, for
commercial pur-
poses, is, at
least, suspended,
if not *ipso facto*
determined, by
the breaking out
of war between
those countries;
as the effect of
a state of war is
to render illegal
all intercourse
between the
subjects and citi-
zens of the hos-
tile nations.

If such part-
nership expire
by its own limit-
ation during the
war, the exist-
ence of the war
dispenses with
the necessity of
giving public
notice of the dis-
solution.

The death,
insanity, or
partnership. (a)

bankruptcy of a partner, works a dissolution of the

(a) S. P. P. S. C. in error, 16 Johns. Rep. 430. *Seaman v. Waddington*, Id. 510

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dington in the District Court of the southern district of *New York*, on the 9th of *March*, 1813, annexed to a petition presented to that Court for the *purpose of obtaining a remission of the forfeiture and penalties incurred by the importation of goods from *England* by *J. Waddington & Co.* in the year 1812, pursuant to the act of Congress of the 2d of *January*, 1813, in which he stated, "that the said firm of *J. Waddington & Co.* is composed of this deponent, *H. Waddington*, and *R. S. Newby*, who are all citizens of the *United States*, and that their business is conducted in *Great Britain* by the said *H. Waddington*, who also conducts the firm of *H. Waddington & Co.*; which last-mentioned firm is composed of himself and this deponent." It was stated by the attorney who drew the petition and affidavit, that he had no particular instructions from the defendant *J. Waddington*, and that he had several petitions to prepare at that time, which the parties were anxious to get forward, and which occasioned a great press of business.

The case contained letters, bills of exchange, and accounts, showing the particulars of the transactions on which the claim of the plaintiffs was founded, and evidence offered as to the permission of the government of the *United States* to its citizens to write letters, and to remit bills of exchange to *Great Britain*, during the late war, which was objected to, but admitted; and the evidence of witnesses offered to show the modern practice and usage of nations as to this kind of intercourse, which was objected to, and overruled by the judge. But it is necessary to state those facts only which relate to the points decided by the Court.

The jury found a verdict for the plaintiffs, for 17,757 dollars and 9 cents, subject to the opinion of the Court, on a case made, with liberty to either party to turn the case into a special verdict, with power to the Court to grant a new trial, or a *venire de novo*.

Griffin, for the plaintiff. The existence of a copartnership between the defendants, at the time when war intervened between the *United States* and *Great Britain*, will not be denied. (1.) Was that partnership dissolved by the war, or otherwise, before the plaintiff's right of action accrued? There is no legal evidence of a dissolution. The *letters between the partners were not competent evidence of such a fact. They are not even admissible to support any equitable defence. This Court will not be influenced by equitable considerations. There is no peculiar hardship in the case, as regards *J. Waddington*. The plaintiffs had long dealt with the firm, and must have relied much on the credit of the partner here. A partnership, though dissolved by mutual consent, between the parties, may still exist as it regards third persons, unless some act is done to make known the dissolution to the rest of the world. The manner in which this is to be done has been much dis-

cussed. It is now settled, that there must be a *notice* in the *gazette* to all the world; and a special notice to all persons who have been in the habit of dealing with the firm. (*Ketcham v. Clark*, 6 Johns. Rep. 144. *Lausing v. Gaine & Ten Eyck*, 2 Johns. Rep. 300.) That any such notice has been given, or that there has been a dissolution, *de facto*, of the partnership, will not be pretended. Then the question is, Did the intervention of the war, *ipso facto*, and of course, put an end to the co-partnership? War, unhappily for mankind, is an event of very frequent occurrence; but we do not find it mentioned in any adjudged case, or enumerated by any elementary writer, among the causes of a dissolution of the contract of copartnership. *Death, bankruptcy, insanity*, decree of a Court of equity on the ground of *misconduct* of one of the partners, are the only causes of dissolution mentioned in the books. If there is not to be found, in any volume of reports, nor in any treatise on the law of partnership, in *England, France, or Holland*, a *dictum* in support of the position that war dissolves this contract, it must be a strong circumstance in support of the claim of the plaintiffs. "Non-usage," says Lord *Coke*, "where there is no example, is a great intendment that the law will not bear it." (*Co. Litt.* 81, b.) Partnerships between citizens of different countries, as between the merchants of *England* and of *Holland, of Spain and Portugal*, must have been frequent during wars between the respective countries. The continuance of partnerships between the subjects of two countries, after war has intervened, is recognized in the *English* reports, without any animadversion; and had they been *deemed unlawful and void, they would not have been passed over without some reprehension. In the case of *McConnel v. Hector*, (3 Bos. & Pull. Rep. 113.) in the C. B. (in 1802,) though it was decided that a petition by a *British* subject, resident in *England*, for a partnership debt, where his partners, who were also *British* born subjects, resident in the enemy's country, would not support a commission of bankruptcy, yet there is not the least suggestion that the contract of partnership was unlawful, or had ceased to exist in consequence of the war. In *Fayle v. Bourdillon*, (3 Taunt. Rep. 546.) the agents who effected a policy of insurance on a licensed voyage, brought an action on the policy, and averred the interest to be in three partners in trade, one of whom resided in *Glasgow*, and the other in the country of the enemy of *Great Britain*. *Shepherd and Vaughan*, *arguendo*, for the plaintiffs, lay down the position, which is not contradicted by the counsel for the defendant, nor by the Court, that a *British* subject, though resident in an enemy's country, may still be a subject, for all the purposes of being a partner in a house of trade in *Great Britain*, and of trading, as from that house; as he may be, on the other hand, an alien enemy, so far as he mixes himself with the commercial transactions of a house of trade in an enemy's country; and that the partnership firm in *Great Britain* might lawfully

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import the goods or insure them, though the same would not be lawful in the partnership firm at *Gothenburgh*.

Again; we find cases of joint shipments, made by one partner residing at home, and the other partner resident abroad, in the enemy's country, where, in case of capture, the share of the partner residing in the enemy's country has been condemned, and the share of the other partner acquitted; thereby recognizing a joint or copartnership interest, existing during the war, between persons, one of whom is in the enemy's country (*The Citto*, 3 *Rob. Adm. Rep.* 38. *The Francis*, 1 *Gallis's Rep.* 618. per *Story, J.*, affirmed on appeal, 8 *Cranch*, 335.) In the case of the *Jonge Klassina*, (5 *Rob. Adm. Rep.* 297.) though not a case of partnership, yet Sir *William Scott* says, that "a man may have mercantile concerns in two countries; and if he acts as a merchant of both, he must be liable to be considered as a *subject of both, with regard to the transactions originating respectively in those countries." Mr. *Ravie*, in that case, had a great manufacturing establishment at *Birmingham*, and had obtained a license to import certain goods from *Holland*, where he had a mercantile establishment, under the firm of *Ravie & Co.*, of *Amsterdam*. Though it was held, that the license did not extend to protect shipments in the name of *Ravie & Co.*, yet there is not the least suggestion as to the operation of war on such commercial connections in an enemy's country. *Chitty*, in his *Treatise on the Law of Nations*, &c. referring to the cases, lays it down as a general rule, that the maintaining a mercantile connection, or commercial establishment, in a hostile country, merely renders the property, connected with that establishment, liable to seizure: he does not say that such a connection, or partnership, is illegal, and, *ipso facto*, void. In the case of *Ten Eyck v. Seaman*, as decided in the Court of Chancery, on the 31st day of *July*, 1799, Chancellor *Livingston* held, that the war (of 1776) between *Great Britain* and the *United States* did not dissolve the partnership, and decreed that *Seaman* should account to his partner, *Ten Eyck*; and this decree was never reversed. (The counsel read a MS. note of the case.)

Again; the defendants, notwithstanding the intervention of the war, elected to continue their partnership, at all events, to *January*, 1813; and the affidavit of *H. W.*, made in *March*, 1813, shows, in addition to the letters, that the partnership was still subsisting. This written declaration, under the oath of the party, is the highest possible evidence of the fact. It is stronger even than that of a record. There cannot, then, be the slightest doubt of the continuance of the partnership, and the want of any advertisement or notice of its dissolution, is additional evidence of its continuance.

Does a war, then, *vi et armis*, dissolve a partnership which the parties have agreed shall continue, notwithstanding the war? If the war has that operation, it must be either to protect the

interest of the individual citizen, or from principles of public policy. Individuals are the best judges of their own interests, and if they elect to continue such a connection, there is no reason for compelling them to dissolve *it. On what principle of public policy is such a contract to be destroyed? Public policy may demand a prohibition of all trade with the enemy. It may forbid intercourse. But if partners elect to continue their connection, under all the disadvantages of a state of war, and subject to all the consequences which may arise, in case of a violation of the allegiance they owe to their respective countries, why may they not be permitted to take the chance of war, and share the eventual profit or loss? Private contracts, especially those of partnership, are solemn things; and though private rights must yield to public necessity, yet that necessity must be of the most imperious nature. Commercial intercourse between nations, of which partnerships form important links, has a most powerful influence in softening the asperities and mitigating the evils of war, that greatest of all human calamities. All commercial intercourse that does not interfere with belligerent rights, and which must, of necessity, be extremely limited, ought to be tolerated, notwithstanding the war. And the evidence, in this case, shows that our government have allowed letters and bills of exchange to be remitted to *British* subjects, during the war. Many practices, formerly deemed lawful in war, have been abrogated, as cruel and inconsistent with the manners of a more enlightened and civilized age. It is true, that *Bynkershoek*, in his treatise, advocates the rights of war, in all their extent. It is a treatise by the hand of a master, but, like the laws of *Draco*, it is written in blood. With that writer, every thing is lawful against an enemy; the use of poison, fraud, and deceit of every kind. He admits, that the conqueror has the power of life and death over the vanquished; may put his prisoners to death, or reduce them to slavery. *Vattel* and *Martens* are of a contrary opinion. Lord Ch. J. *Eyre*, in *Sparenburgh v. Bamsatyne*, (1 Bos. & Pull. 170.) says, "Modern civilization has introduced great qualifications to soften the rigors of war; and allows a degree of intercourse with enemies, and particularly with prisoners, which can hardly be carried on without the assistance of our Courts of justice. It is not, therefore, good policy to encourage those strict notions which are insisted on, contrary to morality and public convenience." *In *C'ark v. Morey*, (10 Johns. Rep. 69.) Kent, Ch. J., says, "The rigor of the old rules of war no longer exists, as *Bynkershoek* admits, when wars are carried on with the moderation which the influence of commerce inspires." Again; since the time of *Grotius*, continued and successful efforts have been made to strengthen justice, to restrain the intemperance of war, and to promote the intercourse and happiness of mankind." It will, perhaps, be said, on the other side, that to allow this commercial intercourse, relaxes the sinews of war, diminishes patriotism, and

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encourages or facilitates traitorous correspondence with the enemy. But what harm can result from a partnership between a manufacturer of *Birmingham*, and another in *Pennsylvania*; or between a farmer of *Devonshire*, and one in *Massachusetts*? Does war dissolve all kinds of copartnership between the subjects of belligerent powers? Does it suspend or destroy the matrimonial contract? Cannot a husband correspond with, or afford support to his wife, residing in the country of his enemy?

Again; it will be said, all *trade* with an enemy is unlawful. Trading with an enemy consists, (1st.) in *buying* from an enemy, as in *Potts v. Bell*, (8 *Term Rep.* 548.) and the *Hoop*, (1 *Rob. Adm. Rep.* 165.) (2d.) In *selling* to an enemy, as in 2 *Roll. Abr.* 173, referred to by Lord Mansfield, in *Gist v. Mason*, (1 *Term Rep.* 84.) who says, he knew of no case which prohibited even a subject from trading with the enemy, except two, the short note in *Roll. Ab.* and a case referred to by Lord Hardwicke in King William's time, of carrying corn to the enemy. In *Henkle v. Royal Exchange Assurance Company*, (1 *Vesey*, 320.) Lord Hardwicke says, "No determination has been, that insurance on enemies' ships during the war is unlawful; it might be going too far to say, all trading with enemies is unlawful."

(3.) Where the trade is such as necessarily leads to personal intercourse, as in the case of the *Rapid*, (1 *Gallis, Rep.* 295.) and the *St. Lawrence*, (1 *Gallis, Rep.* 467.) where the vessels were fitted out here, and sent to the enemy's country. But a partnership may exist, without any buying from, or selling to, an enemy, or even without any epistolary or personal intercourse whatever between the *parties during war, if they have sufficient confidence in each other.

Again; it will be said, that no *contract* can be lawfully made with an enemy. There is a wide difference between saying, after war has commenced, that no contract shall be entered into with an enemy, and dissolving a contract already existing. Suppose the case of landlord and tenant; an *Eng'ishman* holding land in this state, under an act of our legislature, which he has leased. Does not the contract continue? Does not *rent* accrue to the lessor, during war, though the right of action to enforce the payment of it is suspended? (*Bradwell v. Weeks*, 1 *Johns. Ch. Rep.* 206, 208.) An alien enemy, who is compelled to leave the country, may appoint an attorney to act in his name, and to collect debts due to him anterior to the war. (1 *Emerigon*, 567. *Clark v. Morey*, 10 *Johns. Rep.* 69. *Bell v. Chapman, ibid.* 183.) The power of attorney is not revoked by the war; and an agent so appointed, may sell the property of his principal and convert it into money. If an alien enemy may lawfully have an attorney or agent to act for him, why may he not have a partner? The 10th article of the treaty of the 19th November, 1795, (2 *U. S. L.* 476.) between *Great Britain* and the *United States*, declares, that neither the debts due to indi-

viduals of the two countries, respectively, nor moneys in the public funds, nor in public or private banks, shall, in the event of war, be sequestered or confiscated, "it being unjust and impolitic, that debts and engagements, contracted and made by individuals having confidence in each other, and in their respective governments, should ever be destroyed or *impaired* by national authority, on account of national differences." This is declaratory of the sense of the two nations of the modern law on the subject: it is one of the permanent articles of the treaty; and being prospective, and intended to have its operation in all future wars, it was not abrogated by the intervention of the late war. (*Vattel*, B. 3. ch. 10. s. 175. *Levine v. Taylor*, 12 *Mass. Rep.* 8, 10.) Suppose the defendants to be bankers, keeping their banking-house in *London*, the shares of *J. W.* in such house, could not be sequestered or confiscated. His share of the accruing profits of the business could not be forfeited, nor impaired by the war; and after the restoration of peace, he might file his bill in the *English* Court of Chancery for his share of the profits, which would be decreed to be paid to him, as was done by *Ch. Livingston*, in the case of *Ten Eyck v. Seaman*. As it regards this case, the defendants were mere bankers: they received the money of the plaintiff on deposit. The claims of *J. W.* to his share of profits, and his liabilities, it is true, remain suspended, during the war; but they revive, in full force, on the return of peace. The same treaty of 1794, (art. 26.) provides, that in case of rupture between the two nations, "the merchants and others, of each nation, residing in the dominions of the other, shall have the privilege of remaining and continuing their trade so long as they behave peaceably, and commit no offence against the laws." "And in case the respective governments should think proper to order them to remove, twelve months are allowed for that purpose, for their removal with their families, effects and property." This article, though not permanent, shows the great melioration of the practice of nations in war, under the influence of superior civilization.

2. Was there any illegality in the transactions, in regard to the contract on which this action is founded, which ought to defeat the plaintiff's recovery? This is a most ungracious defence on the part of any debtor. It was not unlawful for the plaintiffs to direct their funds to be placed in the hands of the defendants, or to remit bills to them, for the purpose of being collected. The *gist* of the action is to recover money received by the defendants, to the use of the plaintiffs. (Here the counsel entered into an examination of the particulars of the transaction, the facts and arguments as to which it is not thought necessary to state, as they were not taken notice of by the Court.) The following cases were cited: the *Samuel*, 4 *Rob. Adm. Rep.* 233, in *note*. 2 *Hen. Bl.* 378. 11 *East*, 265. 3 *Bos. & Pull* 335. 1 *Campb. N. P. Rep.* 65. 3 *Campb. N. P. Rep.*

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303. 1 *Bos. & Pull.* 170, 171. 345. 353. 8 *Term Rep.* 562. 4 *Burr.* 2039. 1 *Wm. Bl.* 633. 2 *Gallison's Rep.* 210. 3 *Johns. Cases*, 130. 3 *Term Rep.* 418. 454. 5 *Taunt.* 181. *Cowper*, 341.

*3. The judge, on the trial, admitted improper evidence, and rejected proper testimony.

Wells and T. A. Enmet, contra. (1.) War, by that state of things which it necessarily produces, *ipso facto*, dissolves the contract of partnership. A partnership implies the joint exercise of labor and skill, as well as the joint employment of capital, in a lawful trade or business. This contract may be dissolved by its own limitation, or the terms on which it was created; by mutual consent; by an act inconsistent with the partnership; or by the operation of law, or the happening of certain events. Wherever the joint skill and labor which were to be exercised, or the funds that were to be used, for the mutual benefit of the partners, can no longer be so employed, it follows, from principles of natural justice, that the partnership is at an end. "Partnership," says *Domat*, (B. 1. Tit. 8. sect. 5. n. 10.) "whether universal or partial, may be dissolved,"—"not only by the express consent of all the partners, but tacitly, as if the commerce in which they dealt happens to be prohibited." "So, of a partnership, the commerce of which ceases to be free, as if the partnership was for the farm of some lands, taken by the enemy in time of war." (*Ibid.* n. 11.) Where a partnership is dissolved by the operation of law, or by events over which the parties have no control, no notice of that dissolution is necessary. Thus the *death*, *bankruptcy*, or *lunacy*, of one partner, dissolves the contract. In case of death, or lunacy, the skill and labor of the deceased, or insane partner, is taken away by the visitation of Heaven. In the case of bankruptcy, the joint fund is severed, and can no longer be employed for the joint benefit of the partners. So, a voluntary assignment by one partner of his interest, produces the same effect. In all these cases, the law works a dissolution, and where it does so, it is legal notice to all the world. The other partner is not bound to give any notice of the event which has produced such dissolution. The principle which results from this view of the contract is, that wherever a *state of things* occurs, inconsistent with the relative rights and duties of the parties, there is an end to the contract. Wherever, therefore, by operation of law, partners cannot, consistently with their *duty, or from physical incapacity, contribute their mutual skill and labor for their common benefit, the contract necessarily ceases to exist. *War* puts an end to the contract, because all intercourse, at least of a commercial kind, is prohibited. All trading with an enemy, without the license or permission of the government, is unlawful. Constant or frequent intercourse between the parties, is essential to the due management of their joint concerns. The

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intimate and close connection which subsists, requires a concert of views, a constant mutual intelligence, co-operation, and communication. During war, almost all commercial business, to be carried on with safety or success, demands correct information, not only as to the state of markets, but as to political measures and events, and the operations of war. The sole and exclusive object of a commercial partnership being trade, the intercourse between the partners must be for the purposes of trade. If trade with an enemy is unlawful, every thing subservient to that object must be also unlawful. If the end and the means are both illegal, the contract cannot legally exist.

That all trade, or commercial intercourse, between belligerents, is unlawful, we shall show, (1.) from the public law of nations; (2.) from the maritime law of *England*; (3.) from the common law of *England*; (4.) from the law of the *United States*, as settled by the highest tribunals of the country. But we shall first answer some authorities cited, and conclusions drawn from them by the counsel for the plaintiffs. In *M'Connell v. Hector*, (3 *Bos. & Pull.* 113.) this question, as to the legality of the partnership, did not arise. The point was, as to the sufficiency of the debt to support the commission of bankruptcy; and it is a principle of the bankrupt law, that the commission cannot be supported, unless on a debt which can be sued for in a Court of justice. And the petitioning creditor, being one of three partners, two of whom resided in the enemy's country, could not maintain an action during war. In *Fayle v. Bourdillon*, (3 *Taunt.* 546.) the position relied on is merely the argument or opinion of counsel; it was a mere question about a *license*. In the case of the *Citto*, the voyage was from a *Spanish* port to *Guernsey*, in 1796, and Mr. *Bowden's* part of the cargo was condemned, *because he resided in *Holland*. The *Jonge Klassina* was also a *license* case, and though *Ravie's* residence was at *Amsterdam*, yet the property being shipped by him from *Holland*, as a *Dutch* merchant, was condemned. As to the case of *Ten Eyck v. Seaman*, there being no report, nor any authentic account of it, it is impossible to know the extent of its authority. *Emerigon*, and the case of *Clark v. Morey*, and *Ball v. Chapman*, go no further than to say, that when, after war breaks out, a subject of one of the belligerent powers is compelled to leave the country of the other, he may leave a power of attorney to take care of the effects he may leave behind, and to collect debts then due. In the case of the *Francis*, (3 *Cranch*, 335.) the goods were shipped in *Scotland*, before knowledge of the war, by a house of trade there, to a house in this country; and though proof of *American* property was offered, the goods were condemned.

That trading with an enemy is unlawful, is a principle to be found in the writings of every publicist. (*Grotius*, lib. 3. ch. 4. s. 9. *Vattel*, lib. 3. ch. 5. s. 69, 70. *Bynk. Quest. Jur. Pub. ch.*

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3. *Mably, Droit Public de l'Europe*, tom. 6. p. 356. ch. 11 div. 12.) *Bynckershoeck* is clear and explicit on this point. "There can be no doubt," says he, "but that, from the nature of war itself, all commercial intercourse ceases between enemies." Again; "Although trading with the enemy be not specially prohibited, yet it is forbidden by the mere operation of the law of war." (*Vain. liv. 3. tit. 6. Art. 3. Le Guidon*, ch. 2. s. 5. *Pothier, Trait. des Ass. n. 92.*) The same principle is to be found in the maritime and commercial law of England (*Marsh. on Insurance*, 32. 85. *Parke on Insurance*, 314, 315 316. *The Hoop*, 1 *Rob. Adm. Rep.* 196.) Sir *William Scott*, in the case of the *Hoop*, lays it down as a principle to be found in the law of almost every country of Europe, "that all trading with a public enemy, unless with the permission of the sovereign, is interdicted."

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Again; in the case of the *Cosmopolite*, (4 *Rob. Adm. Rep.* 10.) he says, "It is perfectly well known, that by war, all communication between subjects of the belligerent countries *must be suspended, and that no intercourse can legally be carried on between the subjects of the hostile states, but by the special license of their respective governments." War, in its very nature, is a state of violence. It is an exertion of force against force. It is inconsistent with those speculative notions of modern refinement, that would make enmity and friendship, war and peace, co-existent between the same persons. If war is justifiable, it is a right of destruction; and, as long as it endures, the rule, which cuts off all commercial intercourse between enemies, must be its law.

Again; trading with an enemy was, at an early period, an indictable offence, in the English Court of Admiralty. (*Cosmopolite*, 4 *Rob.* 10, 11. in note. *Bl. B.* p. 76.) Thus trading with Scotland, in 13 *Elw.* 2, though under a license from the guardians or keepers of the truce, was held an offence, and the license void. (16 *Vin. Ab.* 599. *Prerog. L. a.* pl. 3.) And in King *William's* time, it was held to be a misdemeanor at common law to carry corn to the enemy in time of war. (1 *Term Rep.* 85. *Gist v. Mason.*) There is not an elementary writer who suggests a different doctrine. The Abb^d *Mably* himself, while he reprobates the severity of the rule, admits it to be the general law. Against all these authorities are cited some loose observations of Lord *Hardwicke* and Lord *Mansfield*. We are disposed to respect even the errors of those great men; but, in fact, they have not expressed the opinions imputed to them. They may have had doubts, whether it was not *good policy* to tolerate some intercourse with the enemy, and, principally, insurances of enemy's property. In 1748, Lord *Mansfield*, when solicitor-general, advocated this *policy* in parliament; but he did not attempt to defend its *legality*. Parliament, however, thought differently, and passed an act, (21 *Geo.* 2. ch. 4.) declaring such insurances void, and annexing certain penalties. The act was *declaratory*, and

he penalties cumulative, and, being temporary, expired with the peace of *Aix la Chapelle*, in 1748. In the war of 1756, which terminated in the treaty of *Paris*, 1763, and during the *American* war, there was no act existing; but it was revived in 1793, (33 *Geo. III.* ch. 27.) and is *declaratory*, superadding certain penalties. Trading with an enemy *is not a statute offence, but is a misdemeanor at common law. Lord *Mansfield*, when he came to the *bench*, in 1755, brought with him his peculiar notions, as to the *policy* of tolerating the practice of insuring enemy's property. This opinion of his lordship, as to the *policy* of allowing a trade with the enemy, or insuring enemy's property, has been mistaken for his opinion as to the *law*; and the lustre of his talents, and his ascendancy in the Court of *King's Bench*, were calculated to continue the delusion. During his time, the question, as to the *legality* of such insurances, was never agitated; for he frowned on every attempt to set up the illegality as a defence, which he considered as dishonest, and against good faith. (Per *Buller*, J. 1 *Bos. & Pull.* 354. *Bell v. Gibson*.) And such was the deference paid to his known opinions on the subject, that no one presumed to raise the objection. He put it altogether on the ground of *expediency*, and its being for the interest of *Great Britain*. He never ventured to reason on the *legality* of the practice. It was not until after his death, that this question was raised. (Here the counsel went into a critical examination of all the cases decided in the *English Courts*. *Thellusson v. Fletcher*, *Doug.* 315. *Bernon v. Woodbridge*, *Id.* 781. *Planche v. Fletcher*, *Id.* 251. *Auther v. Fisher*, *Id.* 618. note. *Gist v. Mason*, 1 *Term Rep.* 84. *Bell v. Gibson*, 1 *Bos. & Pull.* 354. *Potts v. Bell*, 8 *Term Rep.* 543. *Brislow v. Towers*, 6 *Term Rep.* 35. *Brandon v. Nesbitt*, 6 *Term Rep.* 23. *Furtado v. Rogers*, 3 *Bos. & Pull.* 191. *Killner v. Mesurier*, *Id.* 407. *Brandon v. Curling*, *Id.* 410. *Lubbock v. Potts*, 7 *East.* 449.) In *Potts v. Bell*, Lord *Kenyon*, speaking of the very learned and luminous argument of Sir *John Nicholl*, in that cause, says, "that the reasons which he had urged, and the authorities he had cited, were so many, so uniform, and so conclusive, to show, that a *British* subject's trading with an enemy was illegal, that the question might be considered as finally at rest." "That it was now taken for granted, that it was a principle of the common law, that trading with an enemy, without the king's license, was illegal in *British* subjects." The doctrines of the Courts are, then, united on the common law principle; and the universality of the rule, as understood in *Great Britain*, *can no longer be doubted. (See, also, *Park on Ins.* 16. *Marsh on Ins.* 31. 43.) In the case *ex parte Boussmaker*, (13 *Vesey*, 71.) Lord *Eldon* would not permit an alien enemy to prove his debt, under a commission of bankruptcy. "If it had been a debt arising on a contract with an alien enemy, it could not," he said, "possibly stand; for the contract would be void. The policy of avoiding contracts with an enemy was sound and wise." If the

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plaintiff had applied to prove his debt, under a commission of bankruptcy, in *England*, he would not have been heard. Why should he receive a different measure of justice here?

As to the law of this state, the express adjudications in the highest Court of our own country leave no doubt. (a) In the case of the *Julia, Luce*, (8 *Cranch*, 181. 193.) *Story, J.*, in delivering the opinion of the Court, lays it down "as a fundamental proposition, that, strictly speaking, in war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of government, or in the exercise of the rights of humanity." And he adds, "No contract is considered as valid between enemies, at least so far as to give them a remedy in the Courts of either government." "Nor is there any difference between a direct intercourse between the enemy countries and an intercourse through the medium of a neutral port. The latter is as strictly prohibited as the former." (S. P. *The Aurora*, 8 *Cranch*, 203. *The Sally, Porter*, 381. *The Lawrence, Webb*, 11. 434. *The Joseph, Sergeant*, 451. *The Venus, Id.* 253.)

If any case could exist in which the general principle of the law could be relaxed, it was that of the *Rapid*; (8 *Cranch*, 155.) yet *Johnson, J.*, in delivering the opinion of the Court, lays down the rule in still stronger and sterner language. "In the state of war," says he, "nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat." This doctrine, he says, is supported by the records *of appeals in prize Courts, established during the *revolutionary war*. "Certain it is, that it was the law of *England* before the revolution, and, therefore, constitutes a part of the admiralty and maritime jurisdiction conferred on the Court in pursuance of the constitution." "The object, policy, and spirit of the rule is, to cut off all communication, or actual locomotive intercourse, between individuals of the belligerent states. Negotiation, or contract, therefore, has no necessary connection with the offence. *Intercourse*, inconsistent with actual *hostility*, is the offence against which the operation of the rule is directed; and by substituting this definition for that of *trading with an enemy*, an answer is given to the argument." "The ground," says *J. Story*, in the case of the *Rapid*, "upon which a trading with the enemy is prohibited, is not the criminal intentions of the parties engaged in it, or the direct and immediate injury to the state. The principle is extracted from a more enlarged policy, which looks to the general interests of the nation, which may be sacrificed under the temptation of unlimited intercourse, or sold by the cupidity of corrupt avarice." Again; in the *Emulous*, (1 *Gallis's Rep.* 571.) he says, "No principle of national or municipal law

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a) Vide *Amory v. M'Gregor*, ante, p. 24—34. per *Thompson, Ch.*

is better settled, than that all contracts with an enemy, made during war, are utterly void. This principle has grown hoary under the reverent respect of centuries, and cannot now be shaken without uprooting the very foundations of national law." These cases clearly show, that the *intercourse* essential to a partnership cannot be maintained; that it would be criminal. For what purpose, then, can the contract exist? If not for a lawful purpose, it cannot exist at all. How can it continue between parties whose paramount duties are in direct hostility to each other? There can be no communication between the partners, direct or indirect, oral or written, without the permission of government; and that license can only be for a particular purpose. How, then, could the business of this partnership be carried on? The house of trade was confined to *England*, the enemy's country. It could not trade with the *United States*. It could not trade with a neutral country, without its property being liable to capture; if by an *American* cruiser, the whole *would be condemned; if by a *British* cruiser, the half, or share of *J. W.* (*The Rugen*, 1 *Wheat. Rep.* 74. *The Ju'ia*, 8 *Cranch*, 181.) Nay, it is the duty of each partner, in the event of war, to seize the property of each other, as an enemy, when he meets it on the ocean, if armed with authority for that purpose. The duty they owe to their respective countries forbids the performance of the contract of partnership.

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Even in the case of a neutral partner in a *hostile house*, his property, partaking of the hostile character, must share the fate of the enemy's, and is liable to condemnation as prize. The trade may be *hostile*, as well as the persons who carry it on. (*The Vigilantia*, 1 *Rob. Adm. Rep.* 12 case of Mr. *Coopman* referred to. *Susa*, 2 *Rob.* 203. *Portland*, 3 *Rob.* 40. *Jonge Klassina*, 5 *Rob.* 265. *The Antonia*, *Johanna*, 1 *Wheat.* 168. *The Frances*, 8 *Cranch*, 335.) In the case of the *San Jose Indiano*, (2 *Gallis, Rep.* 268.) *J. Story* adopted the doctrine as laid down by Sir *William Scott*, with the highest approbation, and held that the property of a person may have a hostile character, though he is resident in a neutral country. That a house of trade, established in the enemy's country, rendered the property of all the partners liable to condemnation as prize, though some of them resided in a neutral country. The case of the *Citto* was cited to show, that a Court of Admiralty would distinguish between the neutral and belligerent property. But the property, in that case, was not shipped from an enemy's country, and the Court condemned the property, on the ground of a *domicil* in the country of the enemy. Now, if this be the effect of a *hostile trade*, upon a neutral; if that makes it the property and trade of an enemy, how can a co-belligerent be concerned in such trade? This strikes at the very foundation of the contract of partnership, for the trade, to be carried on by the firm, is unlawful. The case of the *Franklin*, *Dana*, (6 *Rob. Adm. Rep.* 127.) shows the distinction between the concern of a neutral in

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a belligerent house of trade, and that of a belligerent in a neutral house. The partnership, as regarded the partner in *England*, was held illegal, because the property was sent to the enemy's country, and his share was condemned, but the share of the partner in *America*, who, being neutral, might lawfully send his property *to *France*, was restored. The conclusion to be drawn from this case is strong. If the trade, where one partner is belligerent, is unlawful when carried on with his enemy, must not the joint trade, where both partners are belligerents, necessarily be with an enemy? Both must act unlawfully in carrying on their trade.

Again; alien enemies are under a further disability: they cannot sue in the Courts of either country. An alien enemy cannot be heard in a Court of justice. He has no *persona standi in judicio*. (a) (*Bell v. Chapman*, 10 *Johns. Rep.* 183. *J. ex dem. Johnston, v. Decker*, 11 *Johns. Rep.* 418.) In the language of Sir *Wm. Scott*, (*The Hoop*, 1 *Rob.* 201.) "a state in which contracts cannot be enforced, cannot be a state of legal commerce." The partnership contract cannot be enforced in either country; and the property of the house is liable to seizure in both. Can a partnership legally exist under these disabilities? The incapacity to sue, demonstrates that the contract is unlawful. The disability is coeval with its existence. It is idle to speak of a contract, and of obligations which it imposes, when it cannot lawfully be enforced. There can be no valid contract, without a remedy to enforce it. In *Bradwell v. Weeks*, (13 *Johns. Rep.* 1.) the Court of Errors decided, that an alien enemy can acquire no right, *flagrante bello*, by mere operation of law. But we do not press that decision, because, if we concede that the law has been misunderstood, it does not interfere with the argument. There was no contract, in that case, express or implied. It was a right acquired, if at all, by the mere operation of law, which cast the estate upon the party who happened, at the time, to be an alien enemy, and he might well be allowed to come, after peace was restored, to ask for the property.

This is not like the case of debts contracted before a war, where the capacity to sue was coeval with the contract, and the remedy is only suspended during war. Here was no remedy existing at the time the contract was made; and *that which had no existence cannot be revived, even by the genial influence of peace. But it is said, that the 10th article of the treaty of 1794 provides for such a case, and saves the right of the party. But we look in vain for such healing efficacy, such a restorative power in that treaty. By the law of nations, the property of an enemy, on the breaking out of war, may be sequestered or confiscated; and Mr. *Pitt*, in 1793, brought a bill into parlia-

(a) Vid. *Bymkershoeck's Ques. Jur. Pub. Lib.* 1. c. 7, for this form of expression. An enemy cannot appear in a Court of justice, either as plaintiff or defendant; figuratively, he cannot have a determinate character in Court; alluding to the original meaning of the word *persona*, a mask used by actors.

ment to protect *French* property from the operation of the general law. The object of the framers of the treaty of 1795 was merely to protect *British* property from sequestration or confiscation, in case of a war; not to legalize a trade during its existence. This Court, in *Jackson v. Decker*, evidently so understood the treaty. The 26th article had expired, and our government, in fact, did not act on the principle of that article.

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2. The partnership was, in fact, dissolved on the 31st of *December*, 1812. It had expired by its own limitation on the 31st of *December*, 1810, but was continued, by agreement, for two years longer. It expired, then, by efflux of time, during a war which superseded the necessity of a public notice, and which, if required, must have been given in *London*, in the enemy's country. Had *H. W.*, in fact, published a notice of the dissolution there, there could have been no ground for this suit; and we contend, that the war rendered such a notice unnecessary. It must have been the joint act of both partners, between whom the war had placed an impassable gulf. But it is said the defendants, afterwards, elected to continue the concern, and the affidavit of *J. W.*, of the 9th of *March*, 1813, is adduced as evidence of such consent. That affidavit was made in reference to the time when the goods were purchased in *England*, and shipped. At most, it is an accidental mistake, committed in the hurry of business, which ought to produce no injurious consequence. Besides, if the doctrine for which we contend, as to the operation of war on an existing partnership, be correct, the parties could not elect to continue the connection during the war. Though you may not find a case in the books in which it has been expressly decided that war puts an end to a contract of partnership, that silence affords no *argument against the doctrine which is a necessary corollary from the law of nations. The international law does not notice or decide on this particular case. It merely pronounces on the character of the individuals, and of their transactions. Elementary writers on the municipal law do not speculate or theorize; they merely digest into systematic form the various adjudications of the Courts of law. If no adjudged case is to be found, it is because the parties, like gamblers, relied on their mutual honor, and would not bring their claims before a Court of justice.

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3. The cause of action arises out of a *trading* with the enemy; and the contract, whether express or implied, is, therefore, void. Personal intercourse is not essential to constitute an illegal trade; nor is buying and selling. In the case of the *Ripit*, there was no personal intercourse or traffic. No matter how or from whence the money was sent. It is enough that it was deposited by the plaintiff in the hands of an enemy, without the permission of government. Remitting a bill of exchange is equivalent to sending money. (Here the counsel examined the facts of the case, in regard to the transaction, and remarked on the authorities cited to this point.)

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Colden, in reply. 1. It is said that there can be no contract, express or implied, no intercourse whatever, personal or epistolary, between belligerents, without the license of government. This may have been the ancient law of nations, the rule of a barbarous age. But it cannot be denied, that, in modern times, the cruel rigors, the inhuman practices of war, have much abated, and been greatly softened. This spirit of humanity has extended not only to the treatment of prisoners, and to the disposition of the property of the vanquished, but as to intercourse between individuals whose countries are at war. The modern law of nations prohibits only that intercourse which affords aid to the enemy, or adds to his strength and resources. The illegality of the intercourse with an enemy depends on the nature of it; whether, in the language of the act against treason, you give *aid* and *comfort* to the enemy. We admit that a *direct* trade with an enemy is unlawful; and that the insurance of *such trade is, also, unlawful and void. For the sake of argument, it might, also, be admitted, that there can be no *express* contract with an enemy; but it does not, therefore, follow that there can be no *implied* contract. The cases of the *Rapid*, the *Julia*, the *Hiram*, and *Potts v. Bell*, were all cases of a direct trade with an enemy. *Story*, J., in his opinion, (1 *Gallis's Rep.* 308, 309.) refers to the case of the *Hoop*, and those cited in that of *Potts v. Bell*, which are all cases of a *direct* trade or intercourse. Not content with these, he refers back 600 years, to the reign of *Edw. II.* and the *Black Book* of the admiralty, which he mistranslates. The words, "*entrecommurent, vendent, ou achatent*," &c., do not mean *intercourse* generally, but merely that there can be no commercial intercourse, or interchange, by buying and selling, without the license of the king or his admiral. He refers, also, to the *Jonge Pieter*, (4 *Rob.* 79.) where the question was, whether there was a trading with the enemy; whether the goods were shipped by a *British* subject to the enemy, through a neutral country. *Valin*, (*liv.* 3. *tit.* 6. *art.* 3.) also, whom he cites, speaks only of a direct trade, and in prohibited goods; and as to the barbarous doctrine of *Bynkershoeck*, founded on the *Roman* law, we have the opinion of an eminent statesman and jurist of our own country, (*Hamilton*; *Camillus*, No. 20.) that nothing can be more horrid or detestable, and that if such pretended rights ever did exist as a part of international law, they have given way to milder and more equitable usages, which constitute the *customary* law of nations, at the present day.

Lord *Hardwicke*, Lord *Mansfield*, and Lord *Kenyon*, in their times, were of opinion, that all intercourse with an enemy was not unlawful; but that there might be a restricted intercommunication, and even a trade to a certain extent. Such, also, was the opinion of *J. Davis*, in the case of the *Hiram*, and of Judge *Peters*, in his charge to the grand jury in *Pennsylvania*, the 7th of *October*, 1813, and of Chancellor *Livingston*, in the case of *Ten Eyck v. Seaman*. Thus we have the opinions of distin-

guished judges and jurists in *Great Britain*, and in our own country, that *some* species of intercourse with an enemy is lawful. Because a direct trade, or an express contract with an enemy, is not *allowed, does it follow that no equitable rights can accrue, nor any obligations arise between individuals whose respective countries are at war? Suppose funds sent forward to *London* before war, but which do not arrive until after war has commenced; does no contract or obligation arise between the person who receives the funds in *England*, and the owner in this country? Can the former be allowed, when called to account, on the restoration of peace, to say, "No: I owe you nothing; the war dissolved all obligations of justice towards you?" Suppose, also, a remittance made to *England* from a neutral country for the benefit of a citizen of the *United States* during the war; could not the *American* citizen, after the war, maintain an action against the person who received his money in *England*? Good faith is to be observed even with an enemy. (*Grotius*, lib. 3. ch. 23. *Puff.* L. N. b. 8. ch. 7. sect. 16.) *Emerigon*, (1 *Trait. des Ass.* 567.) says, that, at the present day, all the sovereigns of *Europe*, for the benefit and security of commerce, have relaxed the rigor of the ancient law, and that a foreigner quitting the country, on the breaking out of war, may leave his power of attorney, to collect his debts. "Les creances que l'Etranger a chez nous, lors de la declaration de guerre, subsistent en leur entier. S'il est forc  de se retirer, il lui est loisible de laisser sa procuration   un ami pour exiger ce qui lui est d , et pour actionner ses debiteurs en Justice." In the case *ex parte Bousmaker*, which has been cited, would not the foreigner have been allowed, after the war was over, to bring an action for money had and received against the assignees of the bankrupt, for the dividends which had come to their hands? In *Kensington v. Inglis*, (8 *East*, 273.) where, under a *license*, goods were imported from *Spain* in an *enemy's* ship, a suit on the policy of insurance was sustained in the name of the *British* subject, though a *trustee* for an enemy. Suppose, after peace, the *Spanish* owner had brought an action against his *English* agent, to recover the amount received by him from the insurers; would the defendant have been allowed to allege that there could be no implied contract, on account of the war? If all intercourse was unlawful, if no implied contract, no equitable obligation, could arise during war, that would be a good defence. In *Bradwell v. Weeks*, (1 *Johns. Ch. Rep.* 206.) Chancellor *Kent* says, "By the modern law of nations, and by the law of the land, of which the law of nations is also a part, an alien enemy does not forfeit his rights of property. In many cases, he is entitled even to sue for his own rights, as when he is permitted to remain in the country, or is brought here as a prisoner of war, or when, perhaps, he is ordered out of the country, in consequence of the war. He is recognized, in our Courts, in the character of executor; (*Brooks v. Phillips*, *Cro.*

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Eliz. 631.) and in all cases his property is protected, and held in trust for him until the return of peace." Again, he says, "Without some special act of the government, an alien enemy is no otherwise affected, in his former capacity, as an alien friend, to hold, acquire, and transmit property, than in the cases to which I have alluded." The plaintiff's claim is founded on a transaction which does not necessarily imply any intercourse with enemies. The fund was in *Antigua*, when war intervened, and was transferred from thence to *London*. This might very well take place without any intercourse. It certainly cannot be criminal intercourse, if it did not aid or comfort the enemy.

Then, does war dissolve a partnership, or merely limit its operations, so far as they may prove prejudicial to belligerent rights? War, it is true, may give the parties an *election* to dissolve the contract. But if they make such election, they must give notice of it, or abide the legal consequence of want of notice. If there is no *election* by either party to dissolve the connection, it must continue limited and restrained to all lawful objects. If the sole object of the partnership was a trade between the two countries, its operations must, of course, be suspended by the intervention of war. In the case put by *Domat*, of a partnership for a particular trade, which becomes unlawful, that destroys the whole subject of the contract. Because war may dissolve a contract of *charter-party*, it does not follow that it puts an end to a partnership. The cases are different. Where the partnership is general, each partner may carry on business in his own country, or with neutral nations, so far as it may be lawful. The business of a partnership may be carried on without any intercourse whatever between the partners; as where there is an active and a *dormant* partner. Intercourse between partners is not essential or absolutely necessary. It must depend on the nature and objects of the partnership. The parties, it is true, may be subjected to the consequence of being sued, without having the right to sue; but that does not render the partnership illegal. That the partnership did, in fact, exist in 1813, is proved by the affidavit of *J. W.*, and any suggestion of a mistake is wholly inadmissible. In case of *bankruptcy*, a legal proceeding takes place, and the party is declared a bankrupt; and until he is so declared, the partnership continues. So, in the case of *lunacy*, there must be an *inquisition of lunacy*, and an inquest found. The mere fact of lunacy does not, of itself, put an end to the partnership. In the case put, of an assignment of a partner's interest in the concern, suppose a debt contracted with the firm, without any knowledge of the assignment; will not the firm be liable? Notice of the fact, or of the dissolution, is essential.

2. The remittance of the bill of exchange, in this case, was innocent. The funds were already in the enemy's country; it was a direction to transfer them from the hands of one enemy

to those of another. To remit *specie* would be very different. That could not be done without a direct trade. In the case of *Potts v. Bell*, the goods were purchased with a bill drawn in England on Amsterdam; yet the objection of its being illegal to draw such a bill, was never suggested.

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Again; the government of the *United States* gave, at least, a tacit consent to our citizens to remit bills to *Eng'land*. There may be a *tacit*, as well as an express consent of the government. (*Puff. b. 8. ch. 7. s. 16. Barbeyrac's note. 4 Rob. 195. 2 Campb. N. P. 44.*) A license may be presumed. Though Congress alone can declare war, yet the *conduct* of the war belongs to the executive of the nation. It is always a question of *state policy*, whether trade with the enemy is to be allowed. Our government certainly countenanced this intercourse; and Courts of justice are not to pronounce on the *policy* of the measure.

Again; admitting that the transaction was unlawful during the war, the defendants, being fund-holders, cannot set up that illegality as a defence. (*2 Poth. Oblig. translated by Evans, notes, p. 8—16.*)

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SPENCER, J., delivered the opinion of the Court. This cause has given rise to several novel and important questions; and when the interesting results, growing out of these questions, are duly estimated, it is impossible to approach them without great solicitude and anxiety.

In considering this cause, I have found it unnecessary to decide some of the points which were ably discussed by the counsel; for, having arrived at a satisfactory conclusion on one of them, which must be decisive as to the plaintiff's claim, I have considered it unnecessary to express any opinion on the others.

Upon the fullest reflection which I have been able to give to the subject, my opinion is, that the declaration of war between the *United States* and *Great Britain* produced a suspension during the war, or, *ipso facto*, a dissolution of the partnership previously existing between the defendants, so that the one is not responsible upon the contract, express or implied; of the other. It will be perceived that this proposition assumes the fact that the partnership between the defendants had not become dissolved by the efflux of time, or the acts of either of the partners, although this point is, in itself, very questionable. The better conclusion from the evidence is, that the partnership expired by its own limitation during the war; and the existence of the war would, at all events, dispense with the *public notice* which is, in general, necessary to the valid dissolution of a partnership.

The case discloses that the firm of *Henry Waddington & Co.* consisted of *Henry* and *Joshua Waddington*; that *Henry* is a British subject, resident, before and during the war, in *London*, conducting the partnership concerns there, whilst the defendant

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was resident here. The negotiations which gave rise to the present suit took place in *England*, and exclusively with *Henry Waddington*, during the late war between this country and *Great Britain*.

It was admitted on the argument, and so the fact undoubtedly is, that the proposition I have advanced is neither supported nor denied by any judicial decisions or elementary *writer of the common law ; but, if I mistake not, it is supported by the strongest reasons, and by necessary analogy with adjudged cases.

The first inquiry is, What are the objects and ends of partnerships ? They are entered into with the view, that, with the joint funds, skill, and labor of the several partners, the interests of the concern may be advanced and promoted. There may be, and frequently are, different inducements influencing each partner : one may have more capital and credit ; another may have more skill, activity, and experience. The one may choose to be a dormant and inert partner, furnishing an equivalent for the services and skill of the other, and leaving the business entirely to his control and management. But, unexplained as this partnership is, we must understand it to be, an union with a view to the employment of the joint capital, labor, and skill, of both the partners, for the purposes of internal and external commerce between this country and *Great Britain*. That the object of the partnership embraced both these objects of internal and external trade, would seem to be unquestionable from the local position of the partners.

That the death, insanity, and bankruptcy, of one of the partners, operates as a dissolution, was not questioned in the argument ; and a respectable elementary writer, Mr. *Watson*, is of opinion that the *marriage of a feme sole partner* would produce the same consequence. The cases of *Pearce v. Chamberlain*, (2 *Ves.* 33.) and *Sayer v. Bennet*, (*Watson*, 382.) and several other cases cited by him, all go to establish the general principle, that death, insanity, and bankruptcy, work a dissolution of partnerships ; and they proceed on the principle, that the other partners are not bound to admit the representatives of a deceased or insane partner into the concern, the confidence having been originally placed in the personal skill and assistance of those no longer able to afford it.

Let these principles be applied to the present case, and it would seem that the same result is inevitable. In what situation did the war put the defendants, as regarded each other ? Most undeniably, the two nations, and all their citizens, or subjects, became enemies of each other, and the *consequence of this hostility was, that all intercourse and communication between them became unlawful. This is not only the acknowledged principle of the law of nations, but is also a part of the municipal jurisprudence of every country. I need not cite cases in support of a position, which has so repeatedly been recognized in the *English Courts*, and in our own, possessing as well admiralty as

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common law jurisdiction. Another consequence of the war was, that the shipments made by each of the partners would be liable to capture and condemnation, by the cruisers of the government of the other; and another very serious evil attended them: no debts contracted in the partnership name could be recovered in the Courts of either nation; they not having, in the language of the law, a *persona standi in judicio*, whilst they were amenable to suits in the Courts of both nations. (The *Hoop*, 1 Rob. 201.) It is true, the same disability to sue for debts due the firm antecedent to the war, would exist. This, however, does not weaken the objection; it remains still an important item, in considering whether a partnership exists, when the new debts created are to be liable to the same disability. It appears, that *Joshua Waddington* is a citizen of the *United States*; and it has been already mentioned that *Henry Waddington* is a *British* born subject. They owed different allegiances, and it became part of their duty to lend all their aid, in a vigorous prosecution of the war, the one to the *United States*, and the other to *Great Britain*; and it appears to me, that it would not comport with policy or morality, that the law should imperiously continue a connection, when, by its very continuance, it would afford such strong inducements to a violation of that fidelity which each owes to his government.

Again; all communication and intercourse being rendered unlawful, and it being a well-established principle, that either partner may, by his own act, dissolve a partnership, unless restrained to continue it for a definite period, by compact, in what manner could such intentions be manifested during the war? It might, indeed, be made known to the public of one of the countries, but it could not be notified to the public of the hostile country; and thus, unless the war *produced a dissolution, he would be responsible, notwithstanding he had the desire to dissolve the connection, merely from inability to make known that determination; an inability produced by events utterly uncontrollable. When the objects and intentions of an union of two or more individuals, to prosecute commercial business, are considered; when it is seen that an event has taken place, without their fault, and beyond their control, which renders their respective nations, and, along with them, the defendants themselves, enemies of each other; that all communication and intercourse has become unlawful; that they can no longer co-operate in the conduct of their common business, by affording each other advice, and are kept hoodwinked, as to the conduct of each other; that the trade itself, in which they were engaged, has ceased to exist; that, if they enter into any contracts, they are incapable of enforcing their performance, by an appeal to the Courts; that their allegiance leads them to support opposite and conflicting interests;—I am compelled to say, that the law cannot be so unjust as to pronounce, that a partnership, so circumstanced, when all its objects and ends are prostrated, shall

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continue; and with the clearest conviction upon my mind, and in analogy to the cases to which reference has been made, I have come to the conclusion, that the partnership between the defendants was, at least, suspended; and I incline to the opinion that it was, *ipso facto*, dissolved by the war, and, consequently that the defendant *J. W.* is not liable to this action.

Much stress was placed upon an affidavit, made by the defendant *Joshua Waddington*, in March, 1813, annexed to a petition presented to the District Court, to obtain the remission of the forfeiture, incurred by the importation of goods from England, by *Joshua Waddington & Co.*, in 1812, in which he states that *Henry Waddington* conducts the firm of *Henry Waddington & Co.*, and that firm is composed of *Henry Waddington* and the defendant; and it has been insisted, that this is an admission of the existence of the firm at that time. It has not been shown, that *Joshua Waddington* has done any one act, as a partner, after the war; and if the affidavit amounts to an admission, it is a mistake of the law upon the subject, and does not affect him. It has not been *shown that, in point of fact, the plaintiffs ever knew of this affidavit, or were misled by it. Had the defendant even promised to pay the demand claimed by the plaintiffs, if there was no prior liability, the promise would have been a *nudum pactum*. There is, however, strong reason to believe, from the evidence of Mr. *Ogden*, that the mistake in the law was entirely attributable to the hurry of the moment, and that it did not originate with *Joshua Waddington*; but I think, that the affidavit, construed in reference to the subject matter of it, does not mean to say that the partnership then existed, but that the goods belonged to that firm, when they were shipped, and when they arrived.

It has, too, been strongly put, that the plaintiffs contracted this debt with the firm, on the faith that *Joshua Waddington* was a partner, and that he ought to have publicly communicated the dissolution of the partnership. I am perfectly satisfied that *J. Waddington* has acted in good faith: there is no pretence that he has done any thing to mislead the plaintiffs, or the public, unless his silence be so considered. If the law worked a suspension or dissolution of the partnership, every person dealing with *Henry Waddington* was bound to take notice of that fact; and with the old dealers of the firm, there was knowledge of all the material facts, which enter into the determination of the cause.

Judgment for the defendant.

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COON.IN error, on *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below, against the plaintiffs in error. The summons was returnable at one o'clock in the afternoon, when the plaintiff below and the justice attended, and having waited until about 3 o'clock, the justice called the parties; the plaintiff answered, but the defendants did not appear. The plaintiff then declared verbally against the defendants, and whilst the justice was writing his declaration down, and had nearly finished it, *Sweet*, one of the defendants, came into the room, and was told by the justice that he had come too late, as he had been called and defaulted, and the plaintiff's counsel informed him that he could not make any defence in the suit, but could only give evidence in mitigation of damages. The plaintiff then produced witnesses in support of his demand, but the proof was illegal and insufficient; the justice, however, gave judgment for the plaintiff below, the defendant in error.

A defendant in a justice's Court, who has been served with a summons, may plead and make his defence, if he appear before the justice has entered upon the trial of the merits of the cause; and the justice has no authority to enter his default for not appearing, on being called before the trial.

Per Curiam. It is to be inferred from the return, that *Sweet*, one of the defendants, when he did appear, claimed the right of defending the cause, on its merits, but was precluded by the justice, on the ground that he had been called, and his default entered. In this the justice erred. He had barely commenced the trial; had not yet finished noting down the plaintiff's declaration, and could not be said to have entered on the merits of the cause. The act (1 N. R. L. 333.) (a) only directs, that if the defendant does not appear to a summons personally served on him, at the time and place appointed in such summons, the justice shall then, or at such other reasonable time as he may appoint, not exceeding six days, proceed to hear the proofs and allegations of the parties. The act does not speak of any default being entered which can preclude the defendant from making a defence. The defendant was, then, in season to answer the declaration, and before any testimony was given; and if the plaintiff, after hearing the defendant's plea, had wanted an adjournment, or a jury, it would not have been too late for him to have claimed it; nor could he in any way have been prejudiced by the defendant's not appearing before. The judgment must, therefore, be reversed on this ground, without noticing the defect of proof in making out any cause of action against the defendants.

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Judgment reversed.

(a) 2 R. S. 223.

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Where jurors agree, each one to mark down the sum he thinks proper to find as damages, and then to divide the total amount of those sums by the number of persons composing the jury, which result should be their verdict, a verdict thus found is irregular, and will be set aside.

(a) On a *certiorari* to a justice's Court, the plaintiff in error may assign, as error in fact, such [* 88] matters as could not come under the observation of the justice, and, therefore, could not be returned by him; as the misconduct of the jury after they had retired to make up their verdict.

(b) The plea of *in nullo est erratum* to an assignment of error in fact, is an admission of the facts assigned as error.

HARVEY against RICKETT

IN error, on *certiorari* to a justice's Court.

The defendant in error brought an action of trespass in the Court below, against the plaintiff in error, for taking his horse out of his pasture, and riding him. From the evidence there was some reason to suppose that the horse was taken by mistake, and not wilfully, the defendant having had permission from a person, who had a horse in the same pasture, to take his horse. The jury, however, found a verdict for the plaintiff below for 20 dollars. The plaintiff in error assigned for error the misconduct of the jury in ascertaining the amount of damages, which was done by each of the jurors marking down a particular sum, and then dividing the whole amount by six. The defendant in error pleaded *in nullo est erratum*.

Per Curiam. The damages assessed by the jury appear under the circumstances disclosed by the return, to be excessive. But in matters of *tort*, we do not interfere to reverse judgments on the ground of excessive damages. The misconduct *of the jury, however, in ascertaining the amount of their verdict, is specially assigned for error; to wit, that it was agreed that each juror should mark the sum he found, and that the total amount divided by six should, without alteration, be the amount of the verdict. The defendant, in answer to this assignment, has pleaded *in nullo est erratum*. That the mode adopted by the jury to ascertain the amount of the damages they should find, was such an irregularity as would vitiate the verdict in our higher Courts, is very well settled; and if this may be assigned for error, the defendant, by pleading *in nullo est erratum*, admits the fact; (9 *Johns. Rep.* 159.) and the judgment, of course, must be reversed. The only question, therefore, is, whether such irregularity, or misconduct in the jury, can be assigned as error in fact. That such matter could not be assigned for error in any Court, having the power to set aside a verdict thus irregularly found, cannot be pretended. But this power justices do not possess; and, unless irregularities of this kind can be corrected in this way, it is an evil without remedy, and that is a principle too pernicious in its consequences to be admitted. This is a matter which does not take place before the justice, and he, of course, cannot be compelled to notice it in his return. It is a matter this Court cannot examine into upon affidavit; and there is no good reason why it should not be assigned for

(a) *Smith v. Cheatham*, 3 *Coxner's Rep.* 57. Acc. vide *Dana v. Tucker*, 4 *Johns. Rep.* 487.

(b) Misconduct of a jury in a justice's Court, properly assignable as error in fact, and if found, the course is to move the Court specially for judgment of reversal, on producing the postea, &c. *Vose v. Smith*, 4 *Cow. Rep.* 17; post. 455.

error in fact; and if not true, the defendant should take issue upon it. In reviewing the proceedings in justices' Courts, we are not regulated by the rules applicable to writs of error. The statute does not view the proceeding in that light. We are to proceed and give judgment according as the very right of the case shall appear, without regarding any imperfection, omission, or defect, in the proceedings in the Court below, in mere matter of form. Whenever any irregularity before the jury appears on the return, we have considered it properly before us, and have reversed the judgment for such cause; (10 *Johns. Rep.* 239.) and whenever any irregularity or misconduct in the jury has taken place, which does not appear, and could not be made to appear on the return, some mode ought to be adopted to reach the evil; and none more fit and appropriate occurs *to the Court than to allow it to be assigned as error in fact. The judgment must, accordingly, be reversed.

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Judgment reversed.

JACKSON, *ex dem.* WOODRUFF and others, against GILCHRIST

THIS was an action of ejectment brought to recover part of lot No. 2, in the subdivision of lot No. 8, in the thirteenth general allotment of the *Kayaderosseras* patent, being about 119 acres of land, situate in the town of *Clinton*, in the county of *Saratoga*. The cause was tried at the *Saratoga* circuit, in September, 1816.

By the patent of Queen *Anne*, dated the 2d of November, 1708, a tract of land, called *Kayaderosseras*, was granted to *Nanning Hermense*, *Johannes Beckman*, *Rip Van Dum*, *Ann Bridges*, and nine other persons. *Ann Bridges*, afterwards, married *Joshua Hunloke*, and the plaintiff deduced a regular title by descent from her. By deeds of lease and release, dated the 10th and 12th of February, 1711, between *Joshua Hunloke* of *Elizabethtown*, in the province of *East New-Jersey*, gentleman, and

Whether, before the colonial act of 1771, the interest of a *feme covert* in land could, in this state, be conveyed otherwise than by fine? *Quære.*

Where the certificate of a justice of the peace, in 1711, of the acknowledgment of a deed, stated that *A.*, and *B.*, his wife, came before him "to acknowledge this indenture to be their acts and

deed;" it was held that the certificate could not be understood to mean merely that the parties came before the justice to acknowledge the deed or with such an intent; but, further, that they did acknowledge it; and that, after such a lapse of time, the private examination of the wife ought to be presumed; and that the estate acquired under a deed thus acknowledged, was confirmed by the act of 1771.

The charter of 1683, of *James*, Duke of *York*, was not in force after the revolution, in 1688

The preamble of a statute may be referred to, to explain the enacting part, when it is doubtful, but not to restrain its meaning when clear and unambiguous.

The statute of 1771, "to confirm certain ancient conveyances," provided, that no claim to any real estate, whereof any person was then actually possessed, should be deemed to be void upon the pretence, that the *feme covert* granting the same, had not been privately examined: it seems that, in respect of new and unsettled lands, the constructive possession arising from the right of property, is sufficient to satisfy the words of the act, such possession being sufficient, in other cases; as to entitle the husband to an estate by the courtesy, or to enable the owner to maintain trespass.

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Ann, his wife, of the one part, and *Peter Fauconier* of the city of *New-York*, merchant, of the other part; the parties of the first part, in consideration of the sum of 60*l.* *New-York* currency, conveyed to the party of the second part, in fee, the thirteenth undivided part of the *Kayaderosseras* patent. On both deeds the following endorsement was written: "This day came before *me, one of his majesty's justices for the county of *Essex*, the within-mentioned *Joshua Hunloke*, and *Ann*, his wife, to acknowledge this indenture to be their acts and deed; this nineteenth of *February*, one thousand seven hundred and eleven, alias twelve. Attested per me, *Jno. Blanchard*." The defendant's title was derived from this deed through sundry mesne conveyances.

A partition of the patent, pursuant to the act of the 8th of *January*, 1762, was commenced in 1769, and completed and filed in the clerk's office of the county of *Albany*, on the 4th of *March*, 1771, by which lot No. 8, in the thirteenth general allotment of the patent, was drawn to the share of *Ann Bridges*. Several deeds were given in evidence, on the part of the defendant, to show acts of ownership and assertion of title by persons deriving title from *Fauconier*; and parol evidence was also given in support of the defence of adverse possession; which, however, it is not necessary to state.

A verdict was taken for the plaintiff, subject to the opinion of the Court, on a case to be made.

Henry, for the plaintiff. 1. The lessors of the plaintiff have proved a complete right, by *descent*, from *Ann Bridges*, one of the patentees of the *Kayaderosseras* patent, to the premises in question. But it will be attempted, on the part of the defendant, to show that *Ann Bridges* aliened her title by the release of the 12th of *February*, 1711, from her and her husband, (*Joshua Hunloke*,) to *Peter Fauconier*. We shall, therefore, contend, (2.) That the deed from *Hunloke* and his wife was altogether void and inoperative as to her and her heirs at law. It is a clear and settled principle of the common law, that a conveyance, or other contract, of a *feme covert*, unless by some matter of record, is absolutely void, and not merely voidable, and it cannot be affirmed, or made good, by any subsequent agreement. (2 *Bl. Com.* 293. *Perkins*, § 154. 1 *Sid.* 120.) The husband has no power to convey his wife's land in fee; and if she joins in the conveyance, unless by matter of record, it is absolutely void. If she joins in a lease for a term of years, it is voidable only. As the conveyance by *Ann Bridges* was not by fine *or matter of record, and as she was not privately examined, and her acknowledgment taken as to the execution of the deed, according to the act, it is void; and her estate, on her decease, descended to *Hunloke Woodruff*, a minor, who resided in *New-Jersey*, until just before the commencement of the revolutionary war, and who, about the close of the war, came to *Albany*

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where he resided until his death, in *July*, 1811. His children are the lessors of the plaintiff. But it will be said that the act of the colonial legislature of *New-York*, passed the 16th of *February*, 1771, (*Van Schaack's* edit. of the laws, p. 611.) confirmed and made valid this conveyance. That statute, if it has any operation on this case, goes to divest a right vested in *H. W.*, the heir by the common law; and ought, therefore, on general principles of law, to be considered as void.

By the charter of liberties and privileges granted by the proprietary government, or the Duke of *York*, passed *October* 30, 1683, and which was the *Magna Charta* of the inhabitants of the province, it is declared, "that no man, of what estate or condition soever, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor banished, nor any ways destroyed, without being brought to answer by due course of law." It also declares, "That no estate of a *feme covert* shall be sold or conveyed but by deed acknowledged by her in some Court of record, the woman being secretly examined, if she doth it freely, without threats or compulsion of her husband." (See 2 *N. R. L. Appendix* III. IV. V.) It contains the principle of the *English Magna Charta*, and of the Bill of Rights of the people of this state, that no person shall be disseised of his freehold, &c. but by the lawful judgment of his peers or due process of law. (1 *N. R. L.* 45.) The *Magna Charta* of *England* is a limitation of the powers of the *British* parliament; and a colonial legislature, which could make no laws repugnant to the laws of *England*, nor claim that omnipotence which is said to belong to parliament, could not make a law in violation of this great charter of rights. (1 *Bl. Com.* 138, 139.) The act was, therefore, void, as contrary to the laws of *England*. In the case of *Gardner v. The Trustees of the Village of Newburgh* (2 *Johns. Ch. R.* p. 162.) *the chancellor held, that the legislature could not take away private property, even for necessary public purposes, without providing a fair compensation to the owner; and he cites numerous authorities, in support of this doctrine, from books of jurists, and the codes and constitutions of different countries. This Court has, also, in several cases, recognized the same doctrine. (*Jackson v. Catlin*, 2 *Johns. Rep.* 248. 263. *Dash v. Van Kleeck*, 7 *Johns. Rep.* 477—508. *Catlin v. Jackson, in Error*, 8 *Johns. Rep.* 520. 539—556.)

But if this statute is not void, it is inapplicable to the present case. Being in derogation of a common law right, it must be construed strictly. It affects those deeds only where the persons claiming under them are in the *actual possession* of the land. The words are, "That no claim to any real estate, whereof any person is now *actually possessed*, whether as tenant in common or otherwise, shall be deemed void upon the pretence, that the *feme covert* granting the same had not been privately examined before any of the public officers," &c. Mere *constructive possession* is not sufficient. There must be an *actual pedis posses-*

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sio under the deed. Again; the act confirms those deeds only where the *feme covert* had not been privately examined before public officers, &c. This can refer only to public officers or magistrates of the colony of *New-York*, not to a case like this, where the acknowledgment was in *Essex* county, in *New-Jersey*.

It will be said, perhaps, that there is a presumption arising from lapse of time, that the right of *Ann Bridges* has been extinguished. But the case affords no evidence of any acts or facts which can authorize this presumption. From mere silence or inaction no inference can be drawn, or presumption raised, of the extinguishment of right, for a time short of the period of the statute of limitations. No matter how many conveyances there may be, or through how many hands the land may have passed; the presumption cannot avail, unless possession accompanies the claim of right. A presumption from mere length of time, to support a right, is very different from a presumption to defeat a right. (*Phillips's L. of Ev.* 117, 118—124. 10 *Johns. Rep.* 377. 7 *Johns. Rep.* 5. 1 *Caines*, 84. 6 *Binney's Rep.* 416. 10 **Miss. Rep.* 105. 5 *Cranch*, 262.) There can be no adverse possession in this case; for the defendant entered, claiming title from *J. H. and Ann Bridges*, by an inoperative conveyance. They derive title from the ancestors of the lessors of the plaintiff, and cannot allege that they entered adversely. (*Jackson v. Sears*, 10 *Johns. Rep.* 435.) There is, also, a recital in the deed which estops him from setting up another title. (*Phillips's Evid.* 355.)

The lease to *De Groff* affords no evidence of a constructive possession. He entered, and was possessed in severalty, by metes and bounds, and his entry cannot be extended beyond those limits; and those claiming under him can go no farther. The rents issued out of this particular parcel, and afford no evidence of a constructive possession of the whole; besides, the covenant is to pay all the quit rents to the crown. Mere perception of profits does not amount to an ouster of possession. (1 *Bl. Rep.* 675. 2 *Bl. Rep.* 690. *Cowp.* 217. 1 *Wils.* 176.)

The payment of taxes is not evidence of possession. (*Jackson v. Myers*, 3 *Johns. Rep.* 388.) The defendant must show, affirmatively, the facts from which the presumption is to be drawn.

Van Buren, (attorney-general,) and *Van Vechten*, contra.
1. The lessors of the plaintiff are the *fifth* generation from the patentee; and during more than a century, there has been no assertion of right on their part, or by any of their ancestors; and from the date of the deed of partition, until the commencement of this suit, there has been no act of ownership or assertion of claim on the part of the lessors. After such a lapse of time, their claim is to be regarded with a jealous eye; and every possible indulgence, as to presumption, ought to be shown to the defendant, in order to quiet the extensive possessions under
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this patent. The deed from *J. H. and Ann Bridges* is technically and formally drawn, and is duly executed by the grantors, and acknowledged before a justice of the peace. It is objected that this acknowledgment by the wife was not made according to the laws of the colony of *New-York*, and that the deed is, therefore, void. But we contend that there is no evidence of the existence of any law of the colony, at the time the deed was executed, which required any different mode of *taking the acknowledgment. The *Charter of Liberties and Privileges* granted by the Duke of *York*, the 30th of *October*, 1683, for the better establishing the government of the province, &c., which has been cited to show the existing law of the colony, never had the force of law. The authority of it was denied by the first colonial legislature, which commenced in 1691, under *William and Mary*. They disavowed all the acts of the Duke of *York*, as such, or as *James II.*, after he came to the crown, and passed a new bill of privileges, which was afterwards repealed by the king, the 11th of *May*, 1697. (*Journ. of Gen. Ass.* p. 8. *Bradford's* ed. *Laws of New-York*, l. 4.) In 1710, Mr. *Bradford* published his revision and digest of the laws of the province, which contain no reference to the Duke of *York's* charter. In 1752, another revision of the laws was made by *Smith and Livingston*, and they take no notice of this charter. In *March*, 1772, an act was passed to revise, digest, and print, the laws of the colony, and *Van Schaack* was authorized to revise, digest, and collect, all the laws in force in the colony, from the revolution, 1688,) until that time. (*Van Schaack's* ed. *Laws*, 676.) The first act in these collections is in the names of *William and Mary*, passed the 6th of *May*, 1691, for quieting and settling the disorders in the province; and for establishing and securing their majesties' present government from like disorders in future; and declaring that no power or authority could be held or exercised in the province but what was derived from the magistrates. There was, then, no act, statute, or charter existing in the colony, regulating the mode of conveyance by a *feme covert*. Indeed, the preamble to the act of 1771 clearly shows that there was no previous statute regulation on the subject.

Again; it is said, that, by the common law of *England*, a *feme covert* cannot convey her estate, unless by matter of record, as by fine, or common recovery; and that the deed is, therefore, void at common law. But what evidence is there, that the common law of *England* extended to the province, or that it was in force here, as such, prior to the constitution of the state? *New-York*, by the name of the *New-Netherlands*, was a *Dutch* colony until 1674, when it surrendered to the Duke of *York*, and was *ceded to *England* by the treaty of *Breda*, in 1667, and the duke afterwards, in 1674, took out a new patent from the crown. It was a conquered province; and, being held by right of conquest, the common law of *England* was not, of course, introduced; but the former laws and customs continued

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in force until actually changed, and new laws imposed. The common law does not attach to a conquered province, without a special ordinance for that purpose. (2 P. Wins. 74, 75 *Blankard v. Gally*, Salk. 411. 1 Bl. Com. 107, 108. *Tucker's ed. of Bl. Com.* 381. *Smith's Hist. of N. Y.* Carey's ed. 268. 271. note, opinion of Sir John Randolph.) By the articles of capitulation of 1664, (art. 11.) between the Dutch governor and the English commissioners, the Dutch laws and customs were expressly saved and secured to the inhabitants; and this was recognized by an act of the legislature of the colony, passed the 5th of July, 1715, (*Van Schaack's ed. laws*, 97.) There was, then, no English common law, rule, or custom, existing on the subject; and the preamble to the act of the 6th of February, 1771, (*Van Schaack's ed.* p. 611.) speaks of the ancient practice of the colony to record deeds so acknowledged, thereby excluding the idea of any statute having been passed, relative to conveyances by *feme coverts*. On one of the deeds, given in evidence, and set forth in the case, from J. Ross and his wife, dated the 26th of November, 1750, there is an endorsement of the 19th of May, 1769, that the wife then appeared before D. Horsemanden, Esq., chief justice of the Supreme Court, &c., and acknowledged it to be her voluntary act and deed, and it was, therefore, allowed to be recorded. A similar proof, or acknowledgment, of the deed of *De Groff*, was taken before Judge Smith. Indeed, our records are filled with deeds by married women, upon their acknowledgment before justices of the peace, judges, and various public magistrates, without any private examination. A similar practice, relative to conveyances by *feme coverts*, existed in all the colonies. (*Davy v. Turner*, 1 Dallas, 11. *Lloyd v. Taylor*, 1 Dall. 17. *Lessee of Watson v. Bailey*, 1 Binney's Rep. 470. *Fowler v. Shearer*, 7 Mass. Rep. 14. 18, 19.) The Supreme Court of Pennsylvania thought it a most proper case for the application of the maxim, *Communis error facit jus*. A custom of a particular town or city, or county, as to conveyances by infants and *feme coverts*, has been considered as an exception to the general rule of the common law. (*Hob.* 225. *Bro. Abr.* 320. pl. 15.) Thus, in the case in *Dyer*, which is very analogous, the custom, in the town of *Denbigh*, in *Wales*, that a *feme covert* might alienate her land, by surrender and examination in Court, was held good and valid, (*Dyer's Rep.* 363. b.) notwithstanding the statute of 27 Hen. VIII. ch. 26. If, then, there was no legislative provision, requiring a different mode of acknowledgment, or conveyance, will the Court disturb these possessions, for a slight mistake in a matter of form? In *Jackson v. Schoonmaker*, (2 Johns. Rep. 230. 234.) where a deed had been proved, by the oath only of a surviving trustee, before a judge, in 1750, *Kent. Ch. J.*, said, that, until 1771, "the practice of taking the proof of deeds was loose and unsettled. That the practice in the colony, before that time, was undoubtedly to be regarded on a question touching the validity of an an-

cient deed;" and the deed was held valid, so as to establish the plaintiff's title. A strict and literal conformity to a statute will not be required in such a case. Admitting, even, that there was a statute of the colonial legislature on the subject, requiring a private examination of the wife as to the execution of a deed, it does not appear, and is not to be presumed, that the act required the magistrate to endorse a certificate of such examination on the deed; he might have been brought into Court, as a witness to prove the fact. Is the defendant to be concluded, because he cannot produce that evidence? If he has lost the evidence, by lapse of time, or accident, it may be supplied by legal presumption. It is not pretended, that this was not a *bona fide* conveyance, for a valuable consideration; and there are facts and circumstances sufficient to support the presumption. At most, there has been an omission only of a mere legal formality. The presumption required is to support a right. The deeds were put on record, and a deduction of title is recited in them, and they might have been seen by *A. B.* or her heirs; but no act has been done by her, or those claiming under her, until 1815, questioning the validity of the deed from her. The other claimants *under the patent, by their deeds to *Degroff*, in 1768, acknowledge the defendant's title. No matter though they were released in severalty; they were all founded on the validity of the deed of *A. B.* Possession taken under those deeds, was possession against her and her heirs, and they say nothing. This amounts to an acquiescence. Again; in 1769, commissioners were appointed to make partition, and notice of their proceedings was published, in the gazette, according to the act. This was a statute notice to all the world. Surveys were also made, and surveyors entered on the lands under the defendant, yet nothing, during all the time, was said by any of the lessors, or their ancestors. It is fair, then, to presume, that they knew, or believed, that the right of *A. B.* was vested in *Fauconier*. There was, afterwards, a subdivision made, and releases executed, containing recitals as to the title, which were duly recorded. Again; *H. Woodruff* resided in the city of *Albany*, and practised as a physician there, for thirty years, almost within sight of the premises, yet preserved a profound silence, as to any claim, as heir of *A. B.* Surely, under these circumstances, and after a lapse of more than a century, the Court will presume every requisite formality, as to the acknowledgment of the deed. In *Goodtitle v. Duke of Chandos*, (2 Burr. 1065. 1072, 1073.) Lord Mansfield lays down the principle of law, as to these presumptions, that where the presumption, as in this case, is in the nature of *evidence*, it must have *some ground* on which it is to be founded. As if a man have a *power* to suffer a common recovery, every thing will be presumed to have been done rightly and regularly, until the contrary appears. So, if a person interested to *object* to a recovery, has had an opportunity to make objections, but, in-

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stead of doing so, has acquiesced under it, this affords a **presumption** that all was right and regular. (*Eldridge v. Knott*, *Cowp.* 214.) In *Goodright v. Straphan*, (*Cowp.* 201.) it was held, that a re-delivery by a wife, after the death of her husband, of a deed delivered by her when *covert*, was a sufficient confirmation of such deed, so as to bind her, and that *circumstances* alone were equivalent to such a re-delivery. Even an act of parliament may be presumed; and a deed, or grant, is often presumed, not because the Court believe that any deed ever existed, but for the sake of quieting possession. (*Cowp.* 102. 215. *Jackson v. M'Call*, 10 *Johns. Rep.* 377. 380.) "It is," says Lord Erskine, (*Hillary v. Waller*, 12 *Vesey*, 266. "because there are no means of creating belief or disbelief, that such general presumptions are raised upon subjects of which there is no record or written muniment. Therefore, upon the weakness and infirmity of all human tribunals, judging of matters of antiquity, the legal presumption holds the place of particular and individual belief." (*Phillips's Law of Ev.* 170.) The recitals in the deeds, it is true, show that we derive our title from *Ann Bridges*; but they state, also, that the grantors acquired, by lease and release, in 1711, and by subsequent mesne conveyances, a valid title. It is not true, that nothing short of a *pedis possessio* will support the presumption of the existence of a deed, or grant. Acts of ownership on one side, and notice of them, and acquiescence on the other, are sufficient. The presumption is raised for the furtherance of justice, and for the sake of peace. Acquiescence in acts calculated to impress the idea of a conveyance of title, or ownership, has a tendency to deceive, and to lull third persons into a belief of the fact. On this principle, it has been decided, that, if a person, having a title, or claim to land, stands by, and sees a stranger convey it without making known his claim, he is concluded by his silence. In the case of *Jackson, ex dem. Livingston, v. Schutt*, decided in 1796, and affirmed in the Court of Errors, (3 *Johns. Cas.* 118, 119.) this doctrine was settled; and that possession may be shown, not merely by a visible fence, but by acts of ownership, applicable to the nature of the property. Where a person has a color of title, and enters under a deed, an entry into part, will be deemed an entry into the whole. An actual enclosure, or *pedis possessio*, of the whole is not necessary. Now, here are surveys, deeds of partition, entries, and acts of ownership, on the part of the defendant, and those under whom he claims, for above 50 years past. (12 Co. 5. *Van Dyck v. Van Beuren*, 1 *Caines*, 84. 91. *Jackson v. Demarest*, 2 *Caines's Rep.* 382. *Jackson v. Walsh*, 3 *Johns. Rep.* 226. *Roe v. Ireland*, 11 * *East*, 280. *Goodtitle v. Baldwin*, 11 *East*, 468. *Bergen v. Bennett*, 1 *Caines's Cas. in Er.* 1. 1 *Hay. N. C. Rep.* 61. 2 *Hay. N. C. Rep.* 345.) Again; a conveyance in fee, by a *feme covert*, is not absolutely void. Lord Mansfield, in *Goodright v. Straphan*, admitting the distinction between deeds in fee and leases,

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says, the exception was allowed for the advancement of agriculture and tillage; that the Court ought to look into the substance of the deed; that it is in substance a mortgage, though in form a lease for years; that the wife was bound by it, and her subsequent acts set up the mortgage against her. His argument, however, is more subtle than sound; if the deed was a nullity, and void, how could it be confirmed, so as to operate *ab initio*? He concedes the doctrine, that the deed of a *feme covert* may be confirmed. (*Cowp.* 201. *Wotton v. Hele*, 2 *Saund.* 180. n. 9. *Roupe v. Atkinson*, *Bunb.* 162, 163. *Brooke Ab. Accept.* 6. 2 *Roll. Ab.* 26. pl. 2. *Jackson v. Murray*, 7 *Johns. Rep.* 5—11. *England v. Slade*, 4 *Term. Rep.* 682.) If necessary, therefore, a release from *Ann Bridges*, after she became *discovert*, or from her son, *John Hunloke*, or from his grandson, *Hunloke Woodruff*, may be presumed.

3. The lessors of the plaintiff are barred by the covenant of warranty, in the deed from *J. Hunloke* and wife, to *Fauconier*. The deed contains full covenants on the part of the grantors and their heirs, and the title set up by the lessors is by descent from the heir of the grantors. (*Co. Litt.* sec. 711, 712. 2 *Bl. Com.* 301. 306. *Gilb. Tenures*, 133. 12 *Mod.* 512. *Vaughan*, 366. 7 *Bac. Abr.* 234. *Cruise's Dig. Tit.* 32, *Deed*, ch. 4. sec. 9—29. 4 *Dallas*, 163. 2 *Roll. Abr.* 786, 787. pl. 1. *Co. Litt.* 265. sec. 446. 1 *Ld. Raym.* 779. *Saunders on Uses*, 332—369.) The counsel here entered at large into the law as to collateral warranties, and contended, that it was in force in the colony, until the act for the amendment of the law, passed the 8th of March, 1773, (*Van Schaack's* edition of laws, 767. 770. See, also, Stat. 4 *Anne*, c. 16. s. 21. 1 *N. R. L.* 525. sess. 36. ch. 56. s. 26.) (a) when collateral warranties were abolished; but as the Court did not take notice of this point, it is unnecessary to state the argument further.

4. The deed of 1711, by *J. H.* and *Ann Bridges*, was confirmed and made valid by the act of the colonial legislature, passed the 16th of February, 1771. The preamble gives a precise description of the case before the Court. The act is declaratory and remedial. It is a statute of peace, made in favor of *bona fide* purchasers. It ought, therefore, to be construed liberally. The second section, providing a mode, in future, for the proof and record of deeds, shows, that before that time there was no statute regulation, or settled rule, on the subject. But it is said, that this act was void, on general principles, as contrary to the charter of liberties of the province and *Magna Charta*. This is very delicate ground. The greatest caution ought to be observed in questioning any of these old colonial acts, on which so many titles to property, in this state, now rest. How many titles depend on the acts for confirming partitions, however informal or imperfect! In *Van Schaack's* edition of the laws, (p. 31.) is a remarkable act, passed the 12th

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(a) 1 *R. S.* 739.

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of May, 1699, for vacating certain patents, granted by Governor Fletcher, declared to be extravagant. In 1782 and 1786, acts were passed abolishing entails. (Sess. 6. ch. 2. Sess. 9. ch. 12. 1 *Greenl. ed. of Laws*, 205, 206.) (a) Did not these acts equally interfere with vested rights?

Next, as to the power of the colonial legislature to pass such an act. The constitution of the state (art. 35.) (b) declares what shall be the law of the state; that is, "such parts of the common law of *England*, and the statute law of *England* and *Great Britain*, and of the acts of the legislature of the colony of *New-York*, as, together, formed the law of the colony on the 19th of *April*, 1775," &c. The framers of the constitution recognize and adopt these colony laws; they never meant to re-enact them. An act of the colonial assembly, with the assent of the King of *Great Britain*, had all the omnipotence of an act of parliament. *Magna Charta* even is subject to the power of the parliament. In *Great Britain* the absolute sovereignty is in the parliament. It can do no wrong. (*Co. Litt.* 110. a. 4 *Inst.* 36. 1 *Bl. Com.* 51. 90. 180. *Wood's Inst.* 455. 2 *Bac. Abr.* 109. 5 *Com. Dig.* 220.) Where are we to look for the constitution of the colony? Surely not in the charter of liberties granted by the Duke of *York*. Even that declares that no man shall be disseised except by the judgment of his peers, *and the law of the province. Whence did Courts of justice derive their powers? From the common law—from custom and usage; but the common law may be altered by statute. In *Jackson v. Catlin* the act was a private, not a public act, and passed at the instance of the parties. The *British* parliament, notwithstanding *Magna Charta*, may exile their subjects, and pass acts of attainder and forfeiture. After the constitution of the state was adopted, and the bill of rights declared, the legislature passed bills of attainder, and abolished entails. The council of revision (*Const.* art. 2.) was intended to check improvident and unadvised acts of the legislature; yet, if two thirds of the legislature adhere to an act, it becomes a law, notwithstanding the objections of the council. If, then, an act of the colonial legislature, when assented to by the king, has the force and effect of an act of parliament, how can it be impeached or questioned, though it devests a vested right? A similar legislative power was exercised in all the colonies. (*Laws of Maryland*, 1715. ch. 47. *Laws of North Carolina*, p. 143. *Laws of South Carolina*, 132. *Acts of Georgia*, 63. *Laws of Connecticut*, 265. *Laws of Delaware*, 144, &c.) This was a subject of legislative provision in all of them, for quieting possessions and securing *bona fide* purchasers; and we have no evidence of these acts having been questioned in the Courts of the several states. But if, as we contend, the deed was valid, *A. B.*, or her heirs, had no vested right in the land, for she had

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(a) 1 R. S. 722.

(b) 1 R. S. 54.

conveyed it away; and the ancestors of the lessors have acquiesced in the statute for above 40 years. The act did no more than Courts of justice often do, by the aid of presumptions, to quiet possession.

Again; it is said that the act must be strictly construed; but being beneficial and remedial, it ought to be liberally expounded. (6 *Bac. Abr.* 374. 333, 339.) Here has been an adverse possession of part, under a claim of title to the whole, for about 60 years; a progressive series of acts of ownership and possession to this day, hostile to all notion of a title in the lessors of the plaintiff or their ancestors. All these amount to actual possession within the meaning of the act. The defendant may avail himself of the acts of his co-tenants; the partition commenced in 1769, when the whole tract was surveyed under the direction of the surveyor-general, and the record of partition was filed the 24th of January, 1771, in the office of the secretary of state. In 1771, most of the land in the western and northern parts of the state was wild and unoccupied, lying wholly in grant; and if the objection here made is to prevail, most of the titles to lands in those parts of the state will be shaken.

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Henry, in reply. 1. It is said, that this being a conquered country, the common law of *England* was not in force here, unless specially introduced by some ordinance or statute. *Blackstone* (1 *Com.* 107.) lays it down, that if an uninhabited country be discovered and planted by *English* subjects, they carry with them all the laws of *England* which are applicable to their situation. But in conquered, or ceded countries, that have already laws of their own, they remain until expressly changed. This was not, in fact, an uninhabited country when first discovered. It was possessed by the native Indian tribes. The *aborigines* having been conquered by the *European* adventurers, the laws of the *Iroquois*, according to the argument of the defendant's counsel, must have prevailed. Again; if conquered from the *Dutch*, then the *Dutch* law must have continued in force. But the fact is, that the *American* colonies were held by right of *discovery*, and not by conquest; and Judge *Tucker*, in excepting *New-York*, is mistaken in point of fact. *Sebastian Cabot*, in the service of *Hen. VII.*, discovered the country in 1497, from the 33th to the 68th degree of north latitude, and grants were made under the north and south *Virginia* patents, from the 34th to the 45th degree of north latitude, long prior to the discovery, by *Hudson*, of the river which bears his name, and before the *Dutch* settlement. The *Dutch* were intruders; the civil wars in *England* alone prevented the government of that country from immediately expelling them; and the colonists of *New-England* were not in a situation to exert themselves against their new neighbors. The fact is, contrary to all theory and speculation, that the

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English came into possession in full sovereignty, and that the laws of *England* have prevailed here from the beginning; not all the laws of *England*, but such as were *applicable to the situation of the colony. Such, for example, as the law of *descents*, the law as to *baron* and *feme*, &c. Whence did the colonists derive their criminal law, and their modes of trial? Nay, *English* statutes operated in the colony, and were acted upon long before any re-enactment of them by the colonial legislature. Such were the statutes of *uses*, for *abolishing the feudal tenures*; concerning *wills*, and the *distribution of intestates' estates*; concerning *frauds, distresses, rescue, execution, escape, juries, heirs, and ancestor*, and many other statutes which might be mentioned; all of which were in force, though not re-enacted after the *Dutch* were conquered. A few of the statutes were re-enacted in 1772, to remove obscurity; but it was not until 1778 that the legislature began to re-enact various *English* statutes, for the purpose of removing all inconvenience and doubt as to which of them were in force. The constitution speaks of the statute law of *England* and of *Great Britain* as being the law here, that is, the *English* law before the revolution, and the *British* law since. The act for revising and digesting the laws of the state, passed the 15th of *April*, 1786, (1 *Laws of N. Y., J. & V.'s* c. 1. 281.) after reciting this clause of the constitution, directed that all such statutes of *England* and *Great Britain*, as were a part of the law of the colony on the 19th of *April*, 1775, should be brought in, in the shape of bills, to be enacted. In this form the statute of 6 *Edw. I. c. 3.* (omitting only the clause respecting assets,) the statute of 32 *Hen. VIII. c. 28.* and 4 *Anne, c. 16. s. 1.* were enacted, thereby affording, by necessary implication, the sense of the legislature, that they extended to the colony; though the 6 *Edw. I. c. 3.* and 32 *Hen. VIII. c. 28.* were never enacted by the colonial legislature.

The common law of *England*, then, being in force here, *Ann Bridges*, a *feme covert*, could not convey her estate by such an acknowledgment as that made of the deed of 1711. The deed, as to her, is absolutely void. (1 *Bl. Com.* 444. *Co. Litt.* 326. a.) The rule of the common law is founded in sound policy; there could be no good reason for not adopting it here; and it was expressly adopted in the charter of liberties, which does not appear to have been repealed. If there was any exception, in this respect, to the common *law rule, it lies on the defendant to show that exception. The lessors of the plaintiff are entitled to the full benefit of the common law. If there was a law or usage of the colony, as mentioned in the preamble to the act of 1771, of taking the acknowledgment or proof of deeds before a member of the king's council, a judge of the Supreme or County Court, or a master in chancery, it lies with the defendant to show that any other officer might take the acknowledgment, and that a bare acknowledgment, without any

private examination, before a justice of the peace in *New-Jersey*, was sufficient. The certificate of acknowledgment is given by a justice of the peace of *Essex* county, (*N. J.*) who states merely that the parties appeared to acknowledge; not that the wife was privately examined by him, whether she executed the deed voluntarily. It is true, the Court will look at the usage or practice of the colony, but there must be evidence of such usage or practice. A particular case does not prove usage. The practice must be general, before the maxim of *Communis error facit jus* can apply.

2. The act of 1771, we repeat, was void. The colonial legislatures were limited in their powers. (1 *Bl. Com.* 107—109.) The right of property is an inherent right; it is declared, says *Blackstone*, by the great charter, that no freeman shall be disseised or devested of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land, which *Coke* says, means by process of law. (2 *Inst.* 53. note 8.) Private property cannot be taken without the owner's consent. (1 *Bl. Com.* 138, 139.) Our Bill of Rights is copied from *Magna Charta*. (4 *Bl. Com.* 423, 424. 1 *N. R. L.* 46.) As to the acts passed in the other colonies, if they were arbitrary and unconstitutional, they afford no authority or precedent for us. Besides, it will be found that in all the other states, they proceeded on usage, and the private examination of the wife was indispensable.

In *Diney v. Turner*, (1 *Dallas*, 11.) there was a private examination of the *feme covert*, and an usage of above fifty years, was found by the special verdict. Again; in *Lloyd v. Taylor*, (1 *Dallas*, 17.) the constant usage of the province appeared in evidence. So, in *Watson v. Bailey*, (1 *Binney*, 470.) there was a private examination, and an act of the colonial assembly of the 24th of February, 1770, as to usage, was given in evidence; and in *Fowler v. Shearer*, (7 *Mass. Rep.* 14—18.) Ch. J. *Parsons* puts it on the ground of immemorial usage, and provincial regulation. The defendant, in this case, ought, in like manner, to have given evidence of the usage, if he intended to rely upon it.

Agrin: the conveyance is by lease and release, which operates only by virtue of the statute of uses, under which nothing passes, but what the grantor has a right to convey, and actually does convey. (*Sinclair on Uses*, 378. 4 *Cruise's Dig.* 112. tit. 32. ch. 6. s. 43—47. *Id.* tit. 32. ch. 13. s. 16.) If a tenant for life alienes by feoffment, it is a forfeiture of his estate; not so, if he conveys by lease and release; for a conveyance by the statute of uses does not produce a disseisin. The husband cannot disseise the wife. (2 *Bac. Abr. Discontinuance*, C.) *De Groff* and *Groat* were in possession of two small lots, separately. A possession of a nook or corner of the patent cannot operate as a possession of the whole. *De Groff* entered only for a part, and his entry is for his right, and co-extensive with

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it. A possession which is to countervail the legal title, must be a *pedis possessio*, a real and substantial enclosure, an actual occupancy, definite, positive and notorious. (*Jackson v. Schoonmaker*, 2 Johns. Rep. 280.) There can be no extension of possession by construction, where it is against the right owner. The partition, under the colonial act, was only according to the rights of the parties; it can have no effect on the rights or claims of third persons. There was, then, no *actual* possession; and so the statute does not apply.

Again; it is said, we should have asserted our right by actual entry; but an actual entry is not necessary, except to avoid a fine. (*Doug.* 483.) Admitting, even, that the wife was dis-seised, no actual entry was necessary, in order to maintain this suit. The *third* section of this act shows what the legislature meant by actual possession. It speaks of actual possession by a purchaser for twenty years past.

Next, we are told that we are bound by the *collateral warranty*. The defendant's counsel deny that the common law was in force in the colony; and yet set up the doctrine of **collateral warranty* to bar the plaintiff. Where is this doctrine to be found, but in the ancient common law of *England*? But, we repeat, the colonists not only brought with them the common law, but all the statutes passed to meliorate that law, and to adapt it to the progressive improvements of society; and wretched would have been their condition, in many respects, without the benefit of those remedial statutes. Collateral warranties were considered in *England* as a great grievance; and as early as in the 50 *Edw.* III., the commons petitioned the king to declare that no warranty should bar, unless where assets descended from the warranting ancestor. The statute of *Gloucester*, 6 *Edw.* I. ch. 1, had been already passed, which declared, that if a tenant by the courtesy aliened the estate which he held by the courtesy, with warranty, his heir should not be barred by such warranty, unless he inherited lands of equal value from his father. By this statute, then, the collateral warranty, in this case, would be defeated, unless the ancestor of the lessors had assets, which does not appear, but the contrary has been shown by the defendant. (2 *Inst.* 291. 1 *Inst.* 365. a. 4 *Comyn Dig.* *Guaranty*, H. 5. 4 *Cruise's Dig.* 56. tit. 32. ch. 6. s. 18, 19.) Besides, the statute of 4 *Anne*, c. 16. s. 21, which abolished collateral warranties, was in force in the colony, though not re-enacted until 1773, and then from motives of policy, merely, and to remove all doubts on the subject. Our statute (sess. 24. ch. 169. s. 1. 1 *N. R. L.* 183.) is a re-enactment of the stat. *Gloucester*, leaving out the clause as to assets, so that no collateral warranty whatever, or in any case, could bar the issue of the inheritance of the mother. This shows the sense of the legislature as to these collateral warranties. The counsel proceeded in answer to the defendant's counsel, as to the nature and ef

fect of the collateral warranty ; but it is unnecessary to state his argument further.

Again ; the defendant, and those under whom he claims, entered under the deed, and so under the husband, and co-extensive only with his right ; and as his estate ceased at his death, they were only tenants by sufferance, and could not destroy that relation, except by an actual disseisin. Then the case of *Jackson v. Sears*, 3 *Johns. R.* p. 433, applies. There *A.* entered into possession of land,* and afterwards received a deed from his father and mother, but which was not acknowledged by the mother, to whom the land belonged ; it was held, that the acceptance of the deed repelled the evidence that he entered adversely to the title of his mother, and he was deemed to hold, under the deed, his father's estate only, for life ; and on his death, the land reverted to the mother and her heirs. (*Jackson v. Parker*, 3 *Johns. Cas.* 121. *Jackson v. Sharp*, 9 *Johns. Rep.* 163.)

Next, as to the presumptive evidence : the principle is, that " Long and undisputed possession of any right or property, affords a presumption that it had a legal foundation, and rather than disturb men's possessions, even records have been presumed." (2 *Peake's Ev.* 22.) *Omnia præsumuntur solemniter esse acta.* Where there had been uninterrupted possession for ages, a grant from the crown was presumed. (12 *Co.* 5. *Bedle v. Beard.*) But these presumptions are allowed only to make out a defendant's title against third persons, (1 *Caines*, 84. *Jackson v. Woolsey*, 11 *Johns. Rep.* 456.) not against a clear derivative title. The presumption is founded on actual possession, which must accompany and go along with the deed. In *Palmer v. Hicks*, (6 *Johns. Rep.* 135.) the Court say that they will not presume a grant of land under navigable water to the owner of the adjacent soil, without evidence of long exclusive possession and use to warrant it. In the cases cited by the other side, the usage was considered as evidence of a grant, or agreement ; but this evidence may be repelled by showing that the usage was limited, &c. (*Phillips's Ev.* 120, 121.) The usage which is supposed to be founded on a grant, or agreement, determines also the extent of the supposed grant. The right granted is considered as commensurate with the right enjoyed. (*Phillips's Ev.* 124. 4 *East*, 339, 340.) There is no such evidence in this case. No adverse possession whatever has been shown prior to 1787. (*Jackson v. McCall*, 10 *Johns. Rep.* 377. 380. *Jackson v. Lunn*, 3 *Johns. Cas.* 109. 118.)

Time, or antiquity of title, is nothing, without a possession going along with it. (2 *Peake's Ev.* 110. (112. 113.) *Bull. N. P.* 255.) There can be no presumption against a clear *title deduced from the government, short of an actual possession for 20 years. The presumption is admitted only in aid of a defective title. Multiplied presumptions cannot avail any thing, unless founded on actual possession. A deed 100 years old is nothing without possession. The mere record of a deed, for

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the sake of preserving the evidence of title, is no notice, though a registry, made necessary to support title, is so. A survey of land is not evidence of possession. Every presumption may be rebutted by other evidence, by parol evidence, or any kind of proof which goes to destroy it. (*Runn. Eject.* 284.) Presumption arises from acts, not from non-feasance. There is no evidence of any acts done by *A. Bridges* to raise a presumption. Again; presumptions are to supply facts about which there is no proof. Now, here the deed itself is produced, and the Court are called upon to presume that deed to be a legal and perfect conveyance. They produce a defective deed, and ask that it be presumed good. If the deed had not been produced, there might have been some reason for presuming every thing in its favor. In *Jackson v. Vosburgh*, (9 *Johns. Rep.* 270.) the Court say, that the possession, in common, had existed so long, that a title, in common, might have been presumed, had not the defendant shown a will as the source from whence he derived title; and the being abandoned, the door was shut against presumption in favor of any other title.

THOMPSON, Ch. J., delivered the opinion of the Court.

The lessors of the plaintiff derive title under *Ann Bridges*, who was one of the original patentees; and their right to recover is made out, unless the title of *Ann Bridges* has been divested, by her own act, in conveying it away, or the right to recover in this action has been lost by lapse of time. The vast amount of property, involved in the questions to be settled by this case, has increased their interest, and has drawn forth from the counsel, on the argument, a very able and elaborate discussion. The conclusion to which the Court has arrived, and the point on which the decision is unanimously placed, has rendered it unnecessary for me to *notice many of the questions which were brought under examination on the argument.

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It is contended, on the part of the defendant, that *Ann Bridges*, who had intermarried with *Joshua Hunloke*, parted with her title by the deed, executed by her and her husband, to *Peter Fauconier*, bearing date the 12th day of *February*, 1711. It is objected, however, on the other side, that this deed was not acknowledged in such a manner as to divest the title of a *feme covert*. The acknowledgment purports to have been made before *John Blanchard*; and his certificate, endorsed on the deed, is in these words:—"This day came before me, one of his majesty's justices for the county of *Essex*, the within-mentioned *Joshua Hunloke*, and *Ann*, his wife, to acknowledge this indenture to be their acts and deed, this 19th day of *February*, 1711. *John Blanchard*." In the deed, the grantors are described as of *Elizabeth-Town*, in the province of *East New-Jersey*, and the grantee as of the city of *New-York*. At the time this acknowledgment was made, we had no colonial act on the subject. This has given rise to a very interesting discussion of

the question, how far we were governed and controlled by the common law, in the acknowledgment of deeds by *femes covert*, and by which a *feme covert* could be divested of her title only by fine, or some matter of record; and on which proceeding she was required to be examined privately, or by the Court, to ascertain whether she has parted with her estate freely, and without compulsion from her husband. But there being some diversity of opinion on the bench, how far the common law mode of proceeding was at that time in force here, it has been thought unnecessary, at present, to decide that point. It may, however, I think, be assumed, that, in point of fact, and as matter of practice, the common law, in this respect, has never been adopted with us; and it may not be amiss briefly to observe, that, in some of our sister states, which were *British colonies*, and, equally with us, subject to the common law, the mode of acknowledgment adopted in this case, has been substantially recognized and sanctioned. In the case of *Davey and wife v. Turner*, (1 *Dall.* 11.) decided in the Supreme Court of *Pennsylvania*, as early as the year 1764, it was placed on the ground of usage and custom, and the maxim *Communis error facit jus*. The force and effect of such usage was again noticed in the case of the *Lessee of Watson v. Bailey*, (1 *Bin.* 470.) where *Yates, J.*, very justly observes, that the maxim just alluded to had great weight, when the most injurious consequences would flow from counteracting it. Lord *Coke* says, (2 *Inst.* 28.) usage has prevailed, even against *Magna Charta*. In the Supreme Court of *Massachusetts*, Ch. *J. Parsons*, in the case of *Fowler v. Stearer*, (7 *Mass. Rep.* 20.) speaking of an usage in that state, as to conveyances by married women, says, that estates never have there been conveyed by fine, in which the wife might be examined, and, by her consent, be barred by the fine; that whatever was the origin of the usage, it could not be disallowed, without shaking very many of the existing titles to real estates; and that it must now be considered as the law of the land. But, as the decision of the case before us is placed entirely upon the colonial act of 1771, (*Van. Sch. ed. Laws*, 611.) it is unnecessary for me further to notice the usage on this subject, or to inquire how far we were then bound by the common law. I have barely referred to some cases that have arisen in other states, where a similar usage has been sanctioned, to show that the common law mode of conveyance, by fine, was not in practice there, nor, most likely, in any of the *British American colonies*. What part of the common law of *England* was in force here, before the *American revolution*, has been a subject of very considerable doubt and difficulty; (*Smith's Hist. of N. Y.* 372. 381.) and is not now intended to be decided.

The colonial act to which I have referred, purports to be an act to confirm certain ancient conveyances; and recited that, "whereas it has been an ancient practice in this colony to record deeds concerning real estates upon the previous acknowl-

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edgment of the grantors, or proof made by any of the subscribing witnesses before a member of his majesty's council, a judge of the Supreme or County Court, or a master in chancery, and sometimes before a justice of the peace. And whereas there are lands and teneiments held under the deeds of *feme covert*, not acknowledged in manner aforesaid, and yet made *bona fide*, and for valuable consideration, *the purchasers whereof, and those holding under them, ought to be secured, both in law and equity, against the respective grantors, their heirs and assigns. It was, therefore, enacted, that no claim to any real estate, whereof any person is now actually possessed, whether as tenant in common, or otherwise, shall be deemed to be void, upon the pretence that the *feme covert* granting the same had not been privately examined before any of the public officers or magistrates aforesaid." The act, then, proceeds to direct the manner in which deeds, thereafter to be made, should be acknowledged and recorded. The provisions of this act apply so directly to the deed in question, that all objections to the title derived under it must cease, unless the act itself can be got rid of. The inference drawn by the counsel from the form of the certificate of acknowledgment, (that the parties came before the magistrate to acknowledge, &c.) that no acknowledgment, in fact, was made, cannot be correct. An acknowledgment was deemed necessary, and the parties went before the officer for the purpose of making it; and it would be a most unreasonable conclusion, that it was not, in fact, done. The officer could hardly have been guilty of so absurd and nugatory an act, as to give a formal certificate, that the parties came before him to acknowledge the deed, if they did not actually acknowledge it. Nor are we to conclude, that because the certificate does not state a private examination of the wife, that no such examination took place. After such a lapse of time, this might, and ought to be, presumed; especially as there was no statute in any manner prescribing the form of the certificate.

But the act of 1771 meets the case, and declares that the estate shall not be deemed to be void, upon the pretence that the *feme covert* granting the same had not been privately examined before the officer. It is not necessarily to be inferred from this provision, that it applied to cases where no private examination had, in fact, been made. The act was intended to confirm ancient conveyances, and to prevent the want of evidence of a private examination being set up to avoid the deed, presuming the evidence of the fact to be lost by the lapse of time. Had it been intended to make good a deed *where no private examination at all had taken place, it would, probably, have been so declared in terms, and not have spoken of this defect as a *pretence*, which by no means necessarily implies an admission of an entire omission of such examination. This construction is strengthened by the provision in the next section, that in all acknowledgments, thereafter, the officer taking the same shall set forth, in his certificate, that the wife had been privately ex-

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amined, and confessed that she executed the deed freely, without any fear or compulsion of her husband. Assuming, then, that a private examination was, in fact, made, though omitted to be set out in the certificate, the great object in view at the common law has been answered, to wit, to ascertain whether the wife acted under fear or compulsion. In a conveyance by common recovery, the *feme covert* was not examined privately, she being in Court, or presumed to be there. The examination of the judges destroyed the presumption of the law, that she was acting under the coercion of her husband. (10 *Coke*, 43. 2 *Roll. Abr.* 395.)

Several objections have been taken to this act, however, which it is necessary to notice. It is said to be against the express provisions of the *Charter of the Duke of York*, of 1683, which declares that no estate of a *feme covert* shall be sold or conveyed, but by deed acknowledged by her in some Court of record, the woman being secretly examined, if she doth it freely, without threats, or compulsion of her husband. (2 *N. R. L. App.* IV.) If this charter was in force here when the acknowledgment in question was taken, and when the act of 1771 was passed, there would be weight in the objection; but I believe it has been the general, if not the universally-received opinion, that this charter was not in force here after the revolution of 1688. In the journals of the general assembly of *New-York*, of the 24th of *April*, 1691, we find the following proceedings:—

“Upon an information brought into this house by several members of the house, declaring, that the several laws made formerly by the general assembly, and his late royal highness, *James*, Duke of *York*, &c.; and, also, the several ordinances, or reported laws, made by the preceding governors and council, for the rule of their majesties’ subjects within *this province, are reported, amongst the people, to be still in force; resolved, *nemine contradicente*, that all the laws consented to by the general assembly under *James*, Duke of *York*, and the liberties and privileges therein contained, granted to the people, and declared to be their rights, not being observed, and not ratified and approved of by his royal highness, nor the late king, are null, void, and of none effect; also the several ordinances made by the late governors and councils, being contrary to the constitution of *England*, and the practice of the government of their majesties’ other plantations in *America*, are, likewise, null, void, and of none effect, within this province.” (1 Vol. *Journals*, 8.) We do not find this charter published in any edition of the colonial laws, as we most undoubtedly should, had it been considered in force. By a resolution of the general assembly of the 12th of *November*, 1709, (1 Vol. *Journals*, 267.) Mr. *Bradford* is directed to print all the acts of the general assembly of the colony then in force since the arrival of Col. *Stoughton*, (*January*, 1689,) and the charter of the Duke of *York* would, undoubtedly, have fallen within the scope and purview, if not within

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the letter of this resolution; for that charter purports to be enacted by the governor, council, and representatives, in general assembly, and by the authority of the same. That the charter of the Duke of York, as such, was not considered in force after the revolution of 1688, is very obvious; because the general assembly of the colony, in 1691, passed an act declaring what are the rights and privileges of their majesties' subjects inhabiting within the province of *New-York*, in which many of the provisions in the charter of the Duke of York are incorporated, and, doubtless, all that were intended to be in force; among others, the very provision relative to conveyances by *femes covert*. (*Brad.* edition of the laws, 2. 5.) But this act was repealed by the king on the 11th of May, 1697, as appears by a marginal note in *Van Schaack's* edition of the laws, (p. 5.) and which was made pursuant to the authority given him by the act of 1772, (*Van Schaack's* edition of the laws, 676.) appointing him to revise and digest the laws of the colony. The charter of the Duke of York not being included in this revision, affords irresistible evidence, that it *was* not deemed to be in force here for he was authorized and required to revise, digest, and cause to be printed, all the laws, from the happy revolution, down to the end of the then session, (1772.) From this view of the acts and proceedings of the colonial legislature, we may very safely conclude, that in 1711, when the acknowledgment in question was taken, there was no charter, or statute regulation, on the subject in force here; but that a loose and unsettled practice prevailed, as is set forth in the recital to the act of February, 1771. It, therefore, became highly necessary and proper, that what had been done under such usage, or practice, should receive legislative sanction.

It has also been contended, that this act interfered with the vested rights of the heirs of *Ann Bridges*; and, on this ground, ought to be declared null and void. Without entering into the question of the authority of the Court to set aside the act altogether, it is certainly a delicate power, and ought to be exercised cautiously, and in extreme and palpable cases only. We do not consider the one before us as one of that class. It is an act, confirming and quieting the title of *bona fide* purchasers, and sanctioning an ancient custom, as to the form of acknowledgment. Such an act ought to receive a liberal and benign interpretation, for the purpose of securing titles derived under such deeds. In *Jackson v. Schoonmaker*, (2 *Johns. Rep.* 234.) this Court, in speaking of the loose manner of taking the proof of deeds, prior to the act of 1771, say, that the practice in the colony before that time, is, undoubtedly, to be regarded on a question touching the authority and validity of an ancient deed. By the custom, in some cities and boroughs in *England*, a bargain and sale, by the husband and wife, where the wife is examined by the mayor, or other officer, binds the wife, after the husband's death. (2 *Inst.* 673.) By the statute 34 *Hen. VIII.*

ch. 22, all such customary conveyances are declared to be of force, notwithstanding the statute 32 *Hen. VIII.* ch. 23, which required the conveyance to be by fine, levied by the husband and wife. The statute 34 *Hen. VIII.* refers to and sanctions certain customs, which had existed in some cities, boroughs, and towns, as to taking and acknowledging deeds; and declares that the same shall stand, *any thing in the act of 32 *Hen. VIII.* to the contrary notwithstanding. So there is a custom in the town of *Denbigh*, in *Wales*, that a *feme covert*, with her husband, may aliene her land there, and it shall bind the wife, and her heirs, as a fine does. This custom is not taken away by the statute of *Wales*, 27 *Hen. VIII.* ch. 28, because, as is said by the Court, the custom is reasonable, and agreeable to some customs in *England*, for the assurance of purchasers. (*Dyer*, 353.) Thus we see, that, in *England*, certain customs, as to acknowledgments by *femes covert*, have been recognized and sanctioned by acts of parliament, notwithstanding such customs were contrary to the course of the common law. But this colony act receives very considerable strength and confirmation from the 35th article in our constitution, (1 *N. R. L.* 41.) (a) which declares, that such parts of the common law of *England*, and of the statute law of *England*, and *Great Britain*, and of the acts of the legislature of the colony of *New-York*, as, together, did form the law of the said colony, on the 19th day of *April*, 1775, shall be and continue the law of this state, subject to such alteration as the legislature shall, from time to time, make concerning the same. The act now in question comes directly within this article, and may fairly be considered as expressly adopted by the constitution. It had very recently been passed, and must have been within the knowledge of the framers of the constitution, who were men too enlightened and upright to infringe upon vested rights. But this article affords a fair inference also, (if it had been thought necessary to enter into that question,) that the whole body of the common law was not considered in force and operation here; otherwise the article would not have spoken of a *part*. It adopts *such part* of the common law, which, together with the statute law, did then form the law of the colony; and how is this to be ascertained? It must be, either by showing an express adoption, or an implied one, to be collected from the course and practice of the Courts, and the usages and customs which prevailed in the government. As it respects the acknowledgment of deeds, by *femes covert*, the common law modes, by fine and recovery, never were in use here. If it were necessary to *pursue this question further, the act of 1771 might be strongly fortified, by referring to what has taken place in other states, in most of which similar laws have been passed; and, from aught that appears, have been sanctioned and upheld by their Courts of justice.

But it has been argued, that, admitting the validity of the

(a) 1 *R. S.* 54.

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act, no such possession has been shown, as to bring the present case within its provisions. Before noticing the facts in relation to the possession, it will be proper to examine the act itself, and see how broad a construction it will admit. It is, in general, true, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs which are intended to be remedied by the statute. This rule must not, however, be carried so far as to restrain the general words of an enacting clause, by the particular words of the preamble. (6 *Bac. Ab.* 380, 381.) Although the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms, yet, if any doubt arises on the words of the enacting part, the preamble may be resorted to, to explain it. (4 *Term Rep.* 793. Sir *William Jones*, 163, *Palm.* 485.) In the preamble to this statute, nothing is said with respect to possession of the land, nor any thing from which it could be inferred, that the act was intended to be confined to deeds for lands in actual possession, at the time of passing the act. After reciting the practice that had prevailed with respect to acknowledgments, it recites that there are lands and tenements held under the deeds of *femes covert*, not acknowledged in manner aforesaid, and yet made *bona fide*, and for valuable consideration. By this it would seem, that the cases intended to be embraced, were those where the purchase was *bona fide*, and for valuable consideration; that, in such cases, the purchasers, and those holding under them, ought to be secured, both in law and equity, against the grantors, their heirs and assigns. The unimproved state of the lands in the colony, at that time, affords a pretty strong argument that the intention of the legislature was to confirm and secure the title in all such cases. To restrict the act to those cases only where there was a *pedis possessio*, would be providing only for a small proportion *of the cases probably intended to be embraced; as, comparatively speaking, but a small part of our lands were, at that time, under actual cultivation and improvement. With such a preamble, and taking such to be the situation of the country, let us apply the enacting clause. It declares that "no claim to any real estate whereof any person is now actually possessed, whether as tenant in common or otherwise, shall be deemed void, upon pretence that the *feme covert* granting the same had not been privately examined," &c. If this clause was to be construed without any reference to, or aid from, the preamble, I should think it would apply only to those cases where the land for which the deed was given was in actual possession. But considering the enacting clause with an eye to the preamble, it would be no very strained construction to apply the word *possessed* to the claim or title, instead of the land itself; and then there would be perfect harmony between the preamble and the enacting clause. But it is not necessary, in this case, to resort to this construction. It has been noticed only for the purpose of showing, that all acts of ownership exercised over

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the land should be viewed as the acts of one having title, and, therefore, liberally construed, and not as the acts of one setting up a possession in opposition to the title, which are to be construed strictly. It is not denied that a regular and complete paper title has been deduced to the defendant, and those under whom he claims, from *Peter Fauconier*, the grantee in the deed from *Ann Bridges* and her husband. Nor is it pretended that there has ever been any actual possession in hostility to this title; and it is a settled rule of law, that where there is no adverse holding, the possession is deemed to be in him who has title. This doctrine has been extended by this Court farther, perhaps, than the *English* rule would admit. In *Jackson v. Sillick*, (3 *Johns. Rep.* 262.) it is held, that where a *feme covert* is the owner of wild and uncultivated land, she is considered, in law, as *in fact possessed*, so as to enable her husband to become a tenant by the courtesy. The observations made by the Court in that case apply, with peculiar force, to the present. It is said there was no *padis possessio*, or possession in fact, of the premises, in the popular sense of the words, by the *husband or his wife, during the coverture; for the lands remained, as new lands, wild and uncultivated, though the title clearly existed in the wife. The question is, Was she not considered as seised in fact, so as to enable her husband to become a tenant by the courtesy? To deny this would be extinguishing the title of tenant by courtesy to all wild and uncultivated land. It has long been a settled point, that the owner of such land is to be deemed in possession so as to maintain trespass. The possession of such property follows the title, and so continues, until an adverse possession is clearly made out. This is the uniform doctrine of this Court. Adopting this rule of construction, the act of 1771 would be fully satisfied without any acts of ownership exercised over the land; but the case before us does not rest even here; for, as early as in the year 1763, a part of this tract, under the title derived from *Ann Bridges*, was sold to *Lewis Groat*, and actual possession taken of the same, which has continued down, ever since, under title derived from him. *Groat*, by his deed, became responsible, and covenanted to pay the quit rent on the whole patent; and, for many years thereafter, he actually did pay the same. In the same year, about 800 acres more of this tract were sold to *H. De Groff*, and actual possession taken, and improvements made, and it has been ever since held under the same title. But the partition which was commenced in the year 1769, and pending, at the very time the act of 1771 was passed, was a still more direct act of ownership exercised over the whole tract. This partition was made under the act of 1762, (*Van Schaack's* ed. 403.) according to the provisions of which various acts of public notoriety and ownership were made indispensably necessary. Among others, a survey of the whole tract to be divided was made. All this was done without any one appearing to set up or represent the claim of *Ann Bridges*,

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upon which the lessors of the plaintiff now place their right to recover, although public notice of such proceedings was given in two newspapers, for twelve weeks, directed to all persons interested in the tract.

Without entering more particularly into the evidence of actual possession, we feel perfectly persuaded, that enough *has been shown to bring the present case within the spirit, true intent, and meaning, of the act of 1771 ; and that the defendant is entitled to all the benefit and protection which it affords. Judgment must, accordingly, be rendered for the defendant.

Judgment for the defendant.

HOGHTALING *against* OSBORN.

Where a jury has been impanelled before *Sunday* commences, their verdict may be received on *Sunday*; but in a trial in a justice's Court, the justice cannot enter judgment on the verdict on that day (a)

IN error on *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below against the plaintiff in error, and a verdict was found for the defendant in error. It appeared, however, that the verdict was received, and the judgment rendered on *Sunday*.

Per Curiam. It was proper to receive the verdict, presuming that the jury were impanelled before *Sunday* commenced ; but it was illegal to enter the judgment on *Sunday*, and for that cause it must be reversed.

Judgment reversed.

(a) *Story v. Elliott*, 8 *Conn. Rep.* 27. *Butler v. Kelsey*, *infra*. 177.

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HALLING.LORING *against* HALLING.IN error on *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below against the plaintiff in error, and declared on a note or memorandum given for 21 dollars, on the sale of certain mortgaged premises, pursuant to a notice under the statute. *By this note, the defendant below promised to pay that sum when the deed was given, provided the proceedings and sale had been regular, pursuant to the statute, and the only question made upon the trial was, as to the sufficiency of the notice, which was dated on the 17th of *February*, 1817, and inserted in a public newspaper the next day, and the sale was on the 7th of *August*. The justice considered the notice sufficient, and, accordingly, gave judgment for the plaintiff below, the defendant in error.

The word *month*, when used in a statute, is, if nothing appear to the contrary, to

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be understood a lunar, and not a calendar month.

(a) The public notice required to be given in cases of sales under powers in mortgages, (sess. 36. c. 32. s. 6. 1 N. R. L. 374.) is sufficient, if published for six successive lunar months previous to the time of sale. (b)

Per Curiam. A month in law is a lunar month, or 28 days, unless otherwise expressed; (2 Bl. Com. 141.) and this, as a general rule, is recognized by this Court in *Leffingwell v. Pierpont*; (1 Johns. Cas. 100.) although it is there decided, that it does not apply to bills of exchange and promissory notes; but that, in the computation of time, in relation to those instruments, a month is construed to mean a calendar month. In *Lacon v. Hooper*, (6 Term Rep. 226.) it is laid down as a general rule, that when the word *month* is used in a statute, without the addition of *calendar*, or any other words to show that the legislature intended calendar months, it is understood to mean a lunar month. Lord *Kenyon* there expressed a wish, that when the rule was first established, it had been decided that *months* should be understood to mean *calendar*, and not *lunar* months; but observed, that the contrary had been so long and so frequently determined, that it ought not again to be brought in question. By an act, (1 N. R. L. 374.) (c) the notice is required to be inserted and continued, at least once a week, for six successive months previous to the sale, in one of the newspapers, &c. There are no words here to take it out of the general rule, that *month* means lunar month; and this seems to have been the construction given to this statute, in *Jackson v. Clark*, (7 Johns. Rep. 217.) The sale in that case was decided to be irregular, but no intimation was given that the time was too short; and the notice there was, like the present, computed by lunar months: it was dated on the 17th of *February*, and the sale was on the 12th of *August*. From these considerations it is very clear that

(a) *Contra*, 2 Dill. 302. 4 Id. 113. 3 Serg. & Rawle. 184.

(b) *Vide* *Parsons v. Chamberlin*, 4 *Wendell's Rep.* 512. *Snyder v. Warren*, 2 *Conn.* 518.

(c) 2 R. S. 515.

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the mode of computing the time of notice, required by the statute, must *be by lunar, and not by calendar months; and this being the only question raised on the return, the judgment must be affirmed.

Judgment affirmed.

BORDEN against FITCH.

A judgment rendered by a Court of another state which has jurisdiction neither of the subject of the action, nor the person of the defendant, is void, and will not be enforced in the Courts of this state. (a)

A judgment rendered in another state against a defendant who never appeared, and had no notice of the proceedings, is void.

A divorce obtained in Vermont by a husband from his wife, who resided in another [* 122]

state, and had no notice of the pendency of the proceedings, is void, and will not legalize a subsequent marriage contracted in this state.

A judgment, or decree, obtained on false or fraudulent suggestions, is void.

It seems, that a judgment obtained in the Courts of another state, having jurisdiction of the subject of the suit, and in which the defendant has been duly notified to appear, is conclusive, in the Courts of this state.

Where a count in a declaration contains a sufficient cause of action, connected, however, with matter insensible and void, or not actionable, it will be intended, after verdict for the plaintiff, that damages were given only for the part that is actionable, and the judgment will not be arrested. (b)

(a) Vide *Elmendorf v. Harris*, 5 *Wendell's Rep.* 516. *Savacool v. Broughton*, *Ibid.* 170. *Starbuck v. Murray*, *Ibid.* 151. *Cleveland v. Rogers*, 6 *Ibid.* 438. *Shumway v. Stillman*, *Ibid.* 447. *Putnam v. Min*, 3 *Ibid.* 202. *Sherman v. Ballou*, 8 *Cov. Rep.* 304. *Wheeler v. Raymond*, *Ibid.* 514. *Hampton v. McConnell*, 3 *Wheat.* 234. *Mauher v. Thatcher*, 6 *Id.* 129.

(b) Vide *Bowman v. Russ*, 6 *Cov. Rep.* 234. *Shumway v. Stillman*, 4 *Cov. Rep.* 292.

The defendant, *Stephen Fitch*, was married in 1784, in the state of *Connecticut*, of which he was then an inhabitant, to *Charlotte Sellick*, and they resided together, as man and wife, in the state of *Connecticut*, until some time in the year 1807, when they separated; during which period they had several children. In *September, 1807*, *Charlotte Fitch* presented a petition to the general assembly of the state of *Connecticut*, complaining of the cruel usage of her husband, who had, at various times, beaten her, and threatened to take away her life, and had so terrified her, that she was afraid to live with him, and had fled from his house for protection, and praying to live separately from him, and be divorced from his bed and board, and for a separate maintenance from him, and to have the government and guardianship of her two youngest children. The resolve of the general assembly stated, that the petition had been duly served on the defendant, and that the parties appeared and were heard, and that threats of cruelty of the defendant to his wife were proved; whereupon it was resolved, at the general assembly, held at *New-Haven*, in *October, 1803*, that the petitioner might, at her election, live and reside separately from the defendant, without being subject to his control, and with the privileges of a *feme sole*; and the sum of 150 dollars was ordered to be paid to her annually, by the defendant, for her maintenance, on condition, however, that she should cause the resolve to be recorded in the records of *New-Canaan*, where she resided.

The defendant's wife, after her separation from him, resided constantly in the state of *Connecticut*, and was living during the period of all the transactions hereafter mentioned. The defendant, in 1813, applied to the Supreme Court of the state of *Vermont* for a divorce *a vinculo matrimonii*, which was granted, at the term of that Court, held in *August, 1813*. The record of the decree of the Court contained the following recital: "*Stephen Fitch of Windsor*, in the county of *Windsor*, and state of *Vermont*, having, by his petition, addressed to this Court, stating, that he, on the 14th day of *June*, in the year of our Lord 1791, was lawfully married to one *Charlotte Sellick*, then of *Stamford*, in the county of *Fairfield*, and state of *Connecticut*; and that the said *Charlotte*, among other causes and things, has been guilty of wilful desertion for more than three years, with total neglect of duty; and, therefore, praying that a bill of divorce may be granted him in the premises; and it being shown to the Court, that the said *Charlotte* has been duly notified to appear before this Court, (if she see fit,) to show cause, if any she have, wherefore the prayer of the said petition should not be granted; and the said *Charlotte* not appearing, or showing sufficient cause, this Court, having fully heard said petition, and the evidence in support of the same, do order, and decree, that the prayer thereof be granted;" and the marriage is, accordingly, declared null and void, to all intents and purposes. It did not appear that the defendant's wife had any actual notice of

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the pendency of these proceedings; and the act of the legislature of *Vermont* relative to divorces, required only a publication in the newspapers, of the citation, in the case of non-resident defendants.

In *October*, 1814, the defendant applied to the plaintiff, a widow, residing at *New-Windsor*, in the county of *Orange*, to receive his two sons into her family, as boarders. To this the plaintiff, after deliberation, consented, and the defendant then requested permission for himself to remain in the family a short time, until he could ascertain whether his children would be contented with their situation. This request was also acceded to, and the defendant, on coming to reside in the family, affected a deportment of the utmost mildness, benevolence, and piety. He frequently dwelt, in conversation, with peculiar tenderness, on his deceased friends, and in connection with them often spoke of his wife, using such ambiguous phrases, as "the departure of his wife,"—"that his wife had departed;" so that, *from the manner of his expressions and the occasions on which they were introduced, he fully impressed all who heard him with the idea that his wife was dead. Soon after he was admitted into the plaintiff's family, he paid his addresses to her daughter, *Rebecca*, who was then of the age of twenty-five years, and materially assisted in the support of the family, by her needle-work. The consent of the daughter, and her mother, the plaintiff, who were acting under the full belief that the defendant was unmarried, was obtained, and the marriage took place about the 28th of *November*, 1814. On the very next day, the defendant threw aside his assumed character, and commenced towards his new wife a conduct of extreme harshness and severity, though not amounting to personal violence, often raising gross and unfounded charges against her reputation and virtue, which were made the pretext for frequent threats and abuse, and finally, by his incessant persecution, her health and all her faculties were impaired. About a week after the marriage, it was discovered that the first wife of the defendant was still living; and although this circumstance was an additional source of disquiet, yet there was at first no suspicion as to the legal validity of the subsequent marriage. In the latter end of *January*, or the beginning of *February*, 1815, the defendant was required by the plaintiff to leave the house, and he removed, with the plaintiff's daughter, to lodgings which he had taken about three miles distant, where they continued a week, when application having been made to counsel, to take measures for the relief of the plaintiff's daughter, the defendant was arrested and imprisoned, on a charge of bigamy, by which means she was released, and returned to the plaintiff's family. The defendant was stated to be a man of considerable property, and evidence was produced of the good character of the plaintiff's daughter, and of loss of service.

At the trial, *Rebecca Borden* was produced as a witness, on the part of the plaintiff, and was objected to, on the ground

that the witness was the defendant's wife; in support of which objection the decree of divorce of the Supreme Court of *Vermont* was given in evidence, and hence arose *the question as to the validity of that divorce: the judge decided that it was void; and the witness being admitted, the defendant's counsel excepted to the opinion of the judge.

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The judge charged the jury that the divorce granted in *Vermont* was of no validity, as regarded the plaintiff's right of action, and that the acquiescence of the plaintiff in the cohabitation of the defendant with her daughter, under the circumstances of the case, did not impair her right of action. The defendant's counsel excepted to this charge, and the jury found a verdict for the plaintiff for 5,000 dollars, being the amount of the damages laid in the declaration.

There was a motion in arrest of judgment; and also to set aside the verdict.

Bristed, for the defendant. 1. As to the motion in arrest of judgment. Several and distinct rights of action are blended in the declaration. A plaintiff cannot join, in the same action, a demand in his own right, and a demand in the right of another. (*Hancock v. Hywood*, 3 Term Rep. 433. 1 Chitty's Plead. 200.) Here the plaintiff, in the third count, joins her own claim for the loss of the service of her daughter, with the claim of her daughter to be supported by her husband, the defendant. An action for a *tort* must be brought in the name of the person whose *legal* right is invaded. (*Dawes v. Peck*, 8 Term Rep. 330. Chitty's Plead. 45, 46. 1 Lev. 247. 1 Sid. 375.) No action is sustainable against the defendant; the second marriage being valid.

If the action is maintainable at all, it should have been brought by the daughter, not the mother. The daughter has an action, on the case, for the injury arising from the fraud practised upon her. (1 Skinner, 119. 1 Bac. Ab. Action on the Case. (K.) Damages cannot be twice recovered for the same injury; and a recovery by the mother will be no bar to the daughter's action.

The verdict, though general, cannot be amended. (*Hopkins v. Beedle*, 1 Caines's Rep. 347. 3 Term Rep. 433. *Brown v. Dixon*, 1 Term Rep. 276. *Union Turnpike Company v. Jenkins*, 1 Caines's Rep. 331. 391, 392. 394. *Stafford v. Green*, 1 Johns. Rep. 505.) The whole proof substantially *applied to the third count. (*Vaughan v. Havens*, 8 Johns. Rep. 110.)

2. The evidence offered as to the cohabitation of the defendant with a former wife ought not to have been received. The first marriage, in *Connecticut*, according to the laws of that state, ought to have been proved. In an action for seduction of this kind, the same proof of the first marriage is required as in an action for *crim. con.*, or on an indictment for *bigamy*. Though,

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in ordinary cases, marriage may be shown by reputation, cohabitation, or confession of parties, (*Fenton v. Reed*, 4 *Johns. Rep.* 52. *Tells v. Forster*, *Taylor's N. C. Rep.* 121. *Peake's Ev.* 263.) yet, in an action of *crim. con.*, and for the same, or, perhaps, a stronger reason, in this action, it is necessary to show the validity of the first marriage; that it was duly solemnized according to the law of the state, or country, where it was celebrated. The *Connecticut* marriage act should have been produced, and, then, proof that the marriage was celebrated according to that act. (*Morris v. Miller*, 4 *Burr.* 2059. *East's P. C.* 470, 471.)

The plaintiff's daughter, in this case, was not a competent witness. It is admitted, in the declaration, that she was the wife of the defendant; and it is well settled, that a wife cannot be a witness for or against her husband, in a civil suit, except to prove the legitimacy or illegitimacy of her children. (*Rex v. Inhabitants of Bramly*, 6 *Term Rep.* 330. *Peake's Ev.* 182.) If it is said that the witness is not the lawful wife of the defendant, because he is married to another who is still living, we answer, that the decree of divorce between the defendant and his first wife, by the Supreme Court of *Vermont*, is *conclusive* here.

Though judgments, on mere questions of property, are evidence only between the parties, yet proceedings *in rem*, or the sentences of ecclesiastical Courts, in matrimonial causes, are evidence against third persons. (*Peake's L. of Ev.* 70—79. *Phillips's L. of Ev.* 223—234. *Gelston v. Hoyt*, 13 *Johns. Rep.* 150. *S. C. in Error*, *Id.* 561. *Dutchess of Kingston's Case*. *Ambl.* 756. 11 *Stat. Trial*, 261.)

[* 7] Again; we contend, that, under the constitution of the *United States*, (art. 4. sec. 1. art. 3. sec. 2. art. 6. 1 *U. S. *Laws*, 63. *Martin v. Hunter's Lessee*, 1 *Wheat.* 304. *Jackson v. Barnes*, 3 *Binney*, 75.) this decree of the Supreme Court of the state of *Vermont* is binding and conclusive on this, and all other Courts of the *United States*. In *Stark v. Chesapeake Insurance Company*, (7 *Cranch*, 420.) the Supreme Court of the *United States* admitted a *record* of a Court of Common Pleas, in *Maryland*, as to naturalization, to be conclusive; and in *Mills v. Duryee*, (7 *Cranch*, 481.) it was decided that *nil debet* was not a good plea to an action founded on a judgment of a Court of another state, and that *nul tiel record* was the only proper plea. *Story, J.*, in delivering the opinion of the Court in that case, says, that "the act (26th *May*, 1790, ch. 11.) declares, that the record, duly authenticated, shall have such faith and credit as it has in the state Court from whence it is taken. If, in such Court, it has the faith and credit of evidence of the highest nature, viz. *record evidence*, it must have the same faith and credit in every other Court. Congress have, therefore, declared the *effect* of the record, by declaring what faith and credit shall be given to it. It remains only

then, to inquire, in every case, What is the effect of a judgment in the state where it is rendered? "Were the construction contended for by the plaintiff to prevail, that judgments of the state Courts ought to be considered *prima facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive, when a Court of the particular state where it is rendered, would pronounce the same decision." If *nul tiel record* is the only proper plea in an action on a judgment of a Court of record of another state, it follows, from the very nature and effect of that plea, that the judgment must be conclusive. (1 *Chitty's Pl.* 354. 480, 481. *Moses v. Macfarlane*, 2 *Burr*, 1009. 4 *East*, 311.)

The decision of the Supreme Court of the *United States*, on this long and much-agitated question as to the validity or effect of the judgments of the Courts of other states, *must put the matter forever at rest. It is a decision conclusive, and binding on all other Courts in the *United States*, and is the law of the land. It may be useful, however, to examine the course of decisions on the point, in this and other state Courts.

In *Hitchcock v. Aicken*, (1 *Caines's Rep.* 460.) which is the leading case in this state, the opinions and reasonings of *Thompson, J.*, and *Livingston, J.*, though differing with the majority of the Court, accords with the judgment of the Supreme Court of the *United States*, in *Mills v. Duryee*, in giving full and conclusive effect to the judgments of the Courts of sister states. In *Le Conte v. Pendleton*, (1 *Johns. Cas.* 104.) in 1799, to an action of debt on a judgment in *Georgia*, the defendant pleaded two pleas, *nul tiel record*, and *nil debet*, and the Court directed the defendant to elect one of the two pleas, and strike out the other. The defendant, afterwards, elected the plea of *nil debet*, but the Court did not decide on it. (*Cole, Cas.* 79.) In *Rush v. Cobbett*, (2 *Johns. Cas.* 256.) in 1801, the Court declined deciding on the validity of the plea of *nil debet*. In 1803, in *Post and La Rue v. Neafie*, (1 *Caines*, 434.) the defendant pleaded *nul tiel record*, (*S. C. note.*) and the Court decided the plea to be improper, and ordered a repleader; and *Kent, J.*, in *Hitchcock v. Aicken*, (1 *Caines*, 432.) considered that decision as leading to the conclusion, that if the judgment of another state was not to be treated in the pleadings as a *record*, it could not have the same obligatory force. Then, *e converso*, if it is to be treated as a *record*, it must have the same obligatory force; and if the judgment of the Supreme Court of the *United States*, in *Mills v. Duryee*, is the law, the decree of the *Vermont* Court, as to the *divorce*, must be conclusive on this Court. The decision in *Hitchcock v.*

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Aicken was confirmed, it is true, by subsequent adjudications, but with some modification; and the Court have avoided deciding on the effect of a decree of a divorce in another state, where the parties were married there, or out of this state. (*Post v. Neafie*, 3 *Caines*, 22—33. per *Spencer*, J. *Jackson v. Jackson*, 1 *Johns. Rep.* 425. *Kilburn v. Woodworth*, 5 *Johns. Rep.* 37. *Hubbell v. Coudrey*, 5 *Johns. Rep.* 132. *Robinson v. Ward*, 8 *Johns. Rep.* 86. *Fenton v. Garlick*, 8 **Johns. Rep.* 194. *Taylor v. Bryden*, 8 *Johns. Rep.* 173. *Pawling v. Bird's Executors*, 13 *Johns. Rep.* 192. *Walsh v. Dunkin*, 12 *Johns. Rep.* 99.) In *Taylor v. Bryden*, the Court says, that when the party has once litigated his case before a Court of competent jurisdiction, and where no fraud or unfairness is pretended, every doubt and every presumption arising on a matter in *pais* ought to be turned against him, and that such judgment was not to be impeached but on positive proof of unfairness or irregularity.

The decisions in all the cases in this state, are on judgments at common law, except that of *Post v. Neafie*, which was on a decree of the Court of Chancery of *New-Jersey*, but by a statute of that state, such a decree is made tantamount to a common law judgment. Divorces belong to the cognizance of ecclesiastical Courts, in *England*, which are Courts of exclusive jurisdiction, and of the Court of Chancery here. But in *England*, the ecclesiastical Court pronounces only a divorce *a mensa et thoro*; divorces *a vinculo matrimonii* are by act of parliament. The Supreme Court in *Vermont*, by statute, had the sole and exclusive power and authority to grant bills of divorce from the bonds of matrimony, for impotency, adultery, or wilful desertion for three years, and also where either party shall have been absent seven years, if unheard of during that time; and also to grant bills of divorce from bed and board, or from the bonds of matrimony, for intolerable severity, as the Court may judge proper, and the nature of the case may require. In *Gelston v. Hoyt*, (13 *Johns. Rep.* 141. 551.) the Court held that such a decree of a Court of competent and exclusive jurisdiction was conclusive on the principle settled in the *Dutchess of Kingston's case* (11 *St. Tr.* 260.)

As to the mode of proceeding to obtain these divorces, prescribed by the statute in *Vermont*, it may be observed, that our act, (1 *N. R. L.* 489. sess. 36. ch. 95. s. 9.) (a) authorizes the bill to be taken *pro confesso*, where the defendant is out of the state, or cannot be found, or is concealed, after a publication of the order for appearance, for eight weeks; and if no appearance is entered after such publication, the Court pronounces its decree in the same manner as if the party *had appeared. (b)

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(a) See vide 2 *R. S.* 144.

(b) The Court of Chancery does not, of course, grant a decree of divorce *a vinculo matrimonii*, in all cases, though the adultery be admitted, or the bill be taken *pro confesso*. *Betts v. Betts*, *Williamson v. Williamson*, (1 *Johns. Ch. Rep.* 197. 488.)

What should we say, if a Court of *Vermont* should declare a second marriage void, though the party had been divorced *a vinculo*, by the Court of Chancery of this state, because such a decree had been given on taking a bill *pro confesso*, against a party out of the state?

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But whatever may be the effect of the reasoning from the principles of the common law, the authority of the decision of the Supreme Court of the *United States* cannot be questioned, and must be conclusive. Indeed, it was time that some decision of that Court should be made, to settle the law on the subject; so that, in future, there might be a harmony and consistency in the decisions of the Courts of the several states, on constitutional questions. It would seem that the provision of the constitution of the *United States*, and the act of congress passed in pursuance of it, were intended, gradually, to produce uniformity in the laws and decisions of the several states, as best calculated to bind together, in permanent and prosperous union, the numerous members of our multiform body politic. There are, then, three different doctrines or opinions floating in the state Courts on this clause of the constitution of the *United States*:—

1. That of this Court, that judgments of *sister states*, like *foreign judgments*, are only *prima facie* evidence;

2. In *North Carolina*, *South Carolina*, and *Pennsylvania*, they are held as conclusive as in the state in which they were rendered: (*Camer. & Norw. Rep.* 486. 2 *Bay's Rep.* 485. 2 *Dallas*, 302.)

3. The Supreme Court of *Massachusetts* have taken a middle ground between these opposite decisions of other states, and hold a judgment of a Court of a sister state not to be so high as a *domestic*, nor so low as a *foreign judgment*; but to be, as some learned philologists define a proposition, “neither significant nor insignificant, but between signification and no signification.” In *Bissel v. Briggs*, (9 *Mass. Rep.* 462.) PARSONS, Ch. J., who delivered the opinion of the Court, said, that judgments of the Courts of other of *the *United States*, were not to be considered as *foreign judgments*, the merits of which might be inquired into, as well as the jurisdiction of the Courts rendering them; nor were they to be considered as *domestic judgments*, rendered in their own Courts of record, because the *jurisdiction* of the Courts rendering them was a subject of inquiry. But that such judgments, so far as the Court rendering them had jurisdiction, were entitled to full faith and credit; and when declared upon as evidences of debts, or promises, the jurisdiction of the Courts rendering them might be inquired into, on the general issue, but not the merits of the judgments.

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Again; the daughter ought not to have been admitted to give evidence of a promise of marriage; because, in an action for seduction, she cannot be a witness to prove such a promise

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in aggravation of damages, since she herself has a right of action for a breach of promise; (*Foster v. Scofield*, 1 Johns. Rep. 297.) nor of the marriage itself, because she has her action also for the injury. (*Skinner's Rep.* 119.)

Nor can she give evidence of bad treatment by the defendant, if considered as his wife, nor if considered as a *feme sole*, for the gist of this action is the mother's loss of service, not the daughter's ill treatment.

Another objection is, that the resolution of the general assembly of Connecticut was tantamount to a divorce *a mensa et thoro*, which would protect the defendant from an indictment for bigamy, and, consequently, must be a bar to a suit for seduction, but would not prevent him from applying for a divorce *a vinculo matrimonii*. (*Pawling v. Bird's Executors*, 13 Johns. Rep. 208.) That the domicile of the wife is that of her husband, is a sufficient answer to her not being in Vermont at the time of the sentence there. (*Jackson v. Jackson*, 1 Johns. Rep. 432. 13 Johns. Rep. 208.)

It may be remarked that in all the cases decided by this Court, where this question has arisen, the plaintiffs have been citizens of this state, claiming to enforce the judgment of another state here. In the present case, the defendant claims protection here for rights granted to him by the highest competent legislative and judicial authority of another state.

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**P. W. Radcliff* and *T. A. Emmet*, contra. 1. As to the causes in arrest of judgment. It is true the daughter may maintain her action for a tort, and may not the mother also? In case of a battery of the wife, the husband and wife may bring a joint action, and the husband may also bring, in his own name, an action of trespass, *per quod consortium amisit*. So, also, in the case of master and servant. A wrong may produce injury to two persons, each of whom may have his action. Matter, not actionable, may be stated in the declaration by way of inducement; and it is no ground for arresting the judgment. The Court will intend that the damages were given for the actionable part only. (*Steele v. West. Int. Lock Navig. Co.* 2 Johns. Rep. 283. *Phetiplace v. Steere*, *Id.* 442. 2 Johns. Cas. 22. n. (a). There is but one injury sued for by the plaintiff; the rest of the matter stated is mere historical narration, or by way of inducement. The objection amounts to this, that matter of inducement is stated, which would be a cause of action to another person. The defect is amendable. (*Stafford v. Green*, 5 Johns. Rep. 505.) The evidence given applies to the first and second counts, and judgment may be entered on them, though the third count is bad.

2. As to the bill of exceptions. The defendant must be confined to the points on which the judge's opinion was given, and to which the exceptions at the trial were taken. (*Graham v*
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Carman, 2 *Caines's Rep.* 163, 169. *Frier v. Jackson*, 8 *Johns. Rep.* 507.)

In all cases, except *bigamy* and *crim. con.* proof of cohabitation, connected with other evidence of a similar kind, is sufficient to prove a marriage. (*Morris v. Miller*, 4 *Burr.* 2057. 9 *Mass. Rep.* 414. 492.) Proof of the actual marriage is not necessary, except in those two cases. (*Phillips's Ev.* 307.) The proof here was, however, admissible as preliminary to the evidence of the act of the legislature of *Connecticut*, decreeing a separation; and being part of the matrimonial history of the defendant, for a period of 23 years. But the real and great question in this case, on which the competency of the daughter as a witness depends, is, whether the decree of divorce by the Court of *Vermont* is conclusive *here. That decree proceeds on the ground of the *wilful desertion* of the wife for three years; she residing, during all that time, in the state of *Connecticut*, never having been, at any time, within the jurisdiction of *Vermont*, and living under the protection of the act of the legislature of *Connecticut*, decreeing her separation from her husband, and allowing her *alimony*, during the time she should choose to live so separate.

The *Vermont* decree would not be valid and conclusive here, if it were merely a judgment for the payment of money. From 1803 to the present time, the law of this state has been, "that a judgment in a sister state is only *prima facie* evidence of a debt," and is not conclusive here. (*Hitchcock v. Aickins*, 1 *Caines*, 460.) In *Jackson v. Jackson*, (1 *Johns. Rep.* 426. 432.) *Spencer, J.*, in delivering the opinion of the Court, says, "The case of *Hitchcock & Fitch v. Aicken* must, as respects this Court, be an authority for saying, that a judgment obtained in a sister state is liable to be impeached in a suit brought on it here, notwithstanding there may have been a full and fair trial in the original suit." In 1809, 1810, and again in 1816, the doctrine is asserted and repeated, that "It is well settled, that a judgment in another state is to be considered here as a *foreign* judgment, in every respect, except in the mode of proving it, which is regulated by a law of the *United States*. It is only *prima facie* evidence of a debt," &c. (*Hubbell v. Cowdry*, 5 *Johns. Rep.* 132. *Taylor v. Bryden*, 8 *Johns. Rep.* 173. *Paulding v. Bird's Executors*, 13 *Johns. Rep.* 205.) In all these cases, the defendant *appeared* in the original suit, and vindicated his right. In no case is it even *doubted*, for a moment, that if the defendant did not appear, or had no opportunity to defend himself, the judgment would not be conclusive. The last decision was made three years after that of the Supreme Court of the *United States*, in *Mills v. Duryee*. In *Kilburn v. Woodworth*, (5 *Johns. Rep.* 41.) which was a suit commenced in *Massachusetts*, by an attachment of goods, without any personal notice, the Court say, that the judgment is not even *prima facie* evidence, sufficient to support an *assumpsit*; and that to bind a defendant person-

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ally *by a judgment, when he had not been personally summoned, nor had notice of the proceedings, would be contrary to the first principles of justice. (See, also, 8 *Johns. Rep.* 86. 194. 3 *Wils.* 397. *Buchanan v. Rucker*, 9 *East*, 192.) So, in regard to laws or adjudications of other states or countries exempting or discharging defendants from liability, our Court does not regard the *foreign law*. (*Smith v. Spinolla*, *Smith v. Smith*, 2 *Johns. Rep.* 198. 235. *Sicard v. Whale*, 11 *Johns. Rep.* 194.)

In most of the cases, also, the Court, besides the objection of its being against the principles of natural justice, have proceeded on the ground of a *want of jurisdiction* in the Court rendering the judgment. In the case of *S'ocum v. Wheeler*, (1 *Day's Conn. Rep.* 429—449.) lately decided in the Supreme Court of Errors of Connecticut, (June, 1816,) the Court say, that "the sentence of a Court that has not jurisdiction of the person, the process, and the subject matter, is an entire nullity, and may collaterally be disallowed." In that case, the sentence of the District Court of the *United States*, sitting as a Court of admiralty, was brought incidentally into question, and the Court say, that to render it conclusive, it must appear that the District Court had jurisdiction of the *subject matter*, and whether it had or not, the state Courts were competent to examine and decide; (*Rose v. Himely*, 4 *Cranch*, 241. 243. *Cheriot v. Foussat*, 3 *Binney*, 220.) and Ch. J. *Reeve*, in *Grimon v. Raymond*, (1 *Day's Conn. Rep.* 40. 45.) lays it down, that where there is a want of jurisdiction over the person, as in the *Marshalsea* case, (10 *Co.* 70.) or over the cause, or over the process, it is the same as though there was no Court. It is *coram non jndice*. The same principle has been recognized and applied in many other cases; (*Bartlett v. Knight*, 1 *Mass. Rep.* 410. *Bissel v. Briggs*, 9 *Mass. Rep.* 462. 13 *Johns. Rep.* 207.) and in the case of *Mills v. Duryee*, *Story, J.*, impliedly admits, that if the defendant had not had notice of the suit, or had not been arrested, the judgment could not have been held conclusive.

If, then, such a judgment, in a sister state, is not conclusive in cases of *property*, *a fortiori*, it cannot be so, where not only property, but the most important relation in life is *concerned. The principle cannot be weaker in its application in proportion as the importance and dignity of the subject matter is increased. The distinction attempted to be made, between a plaintiff coming to assert a right, or claim a benefit, or a defendant claiming merely an exemption from liability, is fallacious and unsound, when applied here. The doctrine for which we contend, applies with equal, if not greater force, to cases of divorce. Not only reason and justice, but the authorities which have been cited, are in favor of its application. In the case of *Jackson v. Jackson*, (1 *Johns. Rep.* 430.) the attorney-general, (*Woodworth*), who argued for the conclusiveness of the *Vermont* de-

ere admitted, that if the Court had pronounced the decree, without having the parties before them, it would have been void. That was a suit for *alimony*, allowed by the decree, and it appeared by the *record*, that both parties were before the Court; yet this Court refused to sustain this suit. By refusing to give the decree effect, as to alimony, the Court virtually denied its efficacy as to the divorce. The place where the parties were married makes no difference in the application of the principle. The contract of marriage is personal, and of universal obligation. It is not of a local nature; nor is it to be supposed to be entered into with reference to the law of a particular place. *Huberus* (*Tom.* 2. 373. 375. 375. *B.* 1. *Tit.* 3.) holds, that a marriage, contracted any where, is binding every where; that a marriage, *in fraudem legis*, is null and void; and where a party goes into a new jurisdiction, he carries with him all his immunities and disabilities, and becomes subject to all the disabilities imposed upon him by the laws of the country where he happens to reside.

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In the case of *Barber v. Root* (10 *Mass. Rep.* 260.) *Sewall*, J., remarks on the law of *Vermont*, under which the decree was pronounced, in the present case, in terms of strong indignation. He says, "that this assumed and extraordinary jurisdiction is an annoyance to the neighboring states, injurious to the morals and habits of the people; and the exercise of it, for these reasons, is to be reprobated in the strongest terms, and to be counteracted by legislative provisions in the offended states."

*The decision of the Supreme Court of the *United States*, in *Mills v. Duryee*, goes no further than to declare the effect of a judgment, by a Court of another state having jurisdiction of the parties. The point decided was, that *nul tiel record* was a proper plea to an action of debt, on a judgment of a Court of another state. *Story*, J., lays great stress on the fact, that the party had full notice of the suit, having been arrested and held to bail, so that it would be held conclusive in the state where it was rendered. *Johnson*, J., dissented. He did not think that the constitution, or act of Congress, required, that the Court should go so far, as to allow the plea of *nul tiel record*, apprehensive that it might lead the Court into difficulty and embarrassment, in preventing the execution of judgments irregularly and unjustly obtained. "There are," he says, "certain eternal principles of justice, which never ought to be dispensed with, but when compelled by some statute; one of those is, that jurisdiction cannot be justly exercised by a state, over property not within the reach of its process, nor over persons not owing them allegiance, or not subjected to their jurisdiction, by being found within their limits. But if the states are at liberty to pass the most absurd laws on this subject, and we admit a course of pleading, which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly an effect will be given to the article of the constitution, in direct hostility

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to the object of it. I will not now undertake to decide, nor does this case require it, how far the Courts of the *United States* would be bound to carry into effect such judgments; but I am unwilling to be precluded, by a technical nicety, from exercising our judgments at all upon such cases."

It is fair to infer, then, that the Supreme Court of the *U. S.* did not intend to go beyond the principle laid down by *Parsons*, Ch. J., in the case of *Bissel v. Briggs*, and who has given a very sound and able exposition of the act of Congress. The same doctrine was held by *Sedgwick*, J., in 1805. (*Bartlett v. Knight*, 1 *Mass. Rep.* 401. 409.) This doctrine is, also, adopted by the Courts in *Kentucky*. (*Rogers v. Coleman*, *Harding's Rep.* 418.) Courts of other states, though supreme *within their respective states, yet, in regard to other states, are, *pro tanto*, Courts of limited jurisdiction. This doctrine, so ably and fully settled, in *Massachusetts*, *Connecticut*, and *Kentucky*, is agreeable to the principle of the *English* law, as laid down by Ch. J. *Willes*, in *Sollers v. Lawrence*, (*Willes's Rep.* 413. 416.) that, in an action founded on a judgment of a Court of record, of limited jurisdiction, it must appear, by what is set forth on the record, that it had jurisdiction; and if sufficient be stated for that purpose, every thing will be intended in favor of the judgment, and that the Court acted right, unless the contrary appears on the record.

Again; a *record*, though conclusive proof that the decision, or judgment of the Court, was as is there stated, yet it is not conclusive, as to the truth of allegations which were not material or traversable. (*Co. Litt.* 352. *b. Phillips's Ev.* 219.) Now, as the statute of *Vermont* made it perfectly immaterial whether *Mrs. Fitch* was a resident of that state or not, or whether she was actually notified of the proceedings or not, it was competent for the plaintiff to prove the negative of those facts.

Again; Courts do not regard any proceeding as matter of *record*, until it is enrolled. (*Croswell v. Byrnes*, 9 *Johns. Rep.* 287. 290.) But this decree has never been enrolled. It contains no account of the previous proceedings, which are important parts of the record, to show that the directions of the statute have been observed.

But admitting, even, that it is a record, and that the decree is to have the conclusive effect for which the defendant's counsel contend; still, we insist, it may be impeached on the ground of *fraud*. The principle of evidence is, "that a judgment of a Court of exclusive jurisdiction, directly upon the point, is conclusive between the *same parties*, upon the same matter coming incidentally in question in another Court for a different purpose." (*Dutchess of Kingston's Case*, 11 *State Tr.* 261. *Phillips's Law of Ev.* 242.) "But though sentences are conclusive, and can not be impeached from within, yet, like all other acts of the highest judicial authority, they are impeachable from without. Fraud is an *extrinsic collateral act, which vitiates the most

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solemn proceedings. Lord Coke says, it vitiates all judicial acts, whether ecclesiastical or temporal." (*Fermor's Case*, 4 Co. Rep. 73. b. *Phillips's Law of Ev.* 224. note. *Doug.* 421. 2 *Sauv.* 159. note. Per *Thompson, J.* 1 *Caines*, 461.) This is not a case of a *conflictus legum*. The legislature of *Connecticut* passed an act to which full faith and credit is to be given, and which must, like every other record, be conclusive evidence of the facts contained in it. By this act, it was made lawful for Mrs. F. to live separate from her husband. The decree in *Vermont* says that she was, while thus living separate under the authority of the act in *Connecticut*, guilty of the crime of *wilful desertion*. How, then, does the decree in *Vermont* stand, in regard to the act of the *Connecticut* legislature? Can a Court in *Vermont* repeal an act of the legislature of another state? This Court must say, what we must presume the Court in *Vermont* would have said, had this act been placed before them. The defendant, by withholding this act from the knowledge of the Court, and by the false suggestion of the *wilful desertion* of his wife, has fraudulently obtained the decree of divorce. If this *Vermont* decree is to have full and conclusive effect every where, it changes, in *Connecticut*, the situation in which *Charlotte Sellick* was placed, by the act of the legislature of that state, and destroys all the rights she acquired under it. Look at the consequences of this state of things. If the legislature of *Vermont* can authorize a decree of divorce, on a residence for three years of the party seeking it, it may be granted on a residence for three months, or three weeks. It is only for a discontented husband to go to some watering place in *Vermont*, on a party of pleasure, and there obtain a divorce. Nay, if the *auri sacra fames* of a venal profession should induce them to obtain an act of the legislature further to facilitate divorces, a husband residing here might write to his attorney in *Vermont*, and obtain a divorce by the return of the mail.

It is true, that the act relative to the Court of Chancery authorizes the taking bills *pro confesso* here, where the defendant is out of the state; but the act is very cautious and guarded. The order for appearance must *be published for eight weeks successively, and though the bill may be taken *pro confesso*, at the expiration of that time, if the party does not appear, yet the decree is not *final*. The party has *one year* after notice in writing of the decree, to come in and be heard, and *seven years*, if he has had no such notice; and if he appears within the time, the proceedings go on as if there had been no decree, which is not final until after the seven years; and the plaintiff who has taken the bill *pro confesso*, before he can obtain any benefit under the decree, must give security to make restitution, in case the defendant should appear and defend the suit within the time allowed for that purpose. There is no analogy, then, between the two cases; and the *argumentum ad hominem* can have no effect.

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Fisk, in reply, observed, 1. That mere cohabitation, or reputation, was not sufficient evidence of the marriage of the defendant with his first wife. (*Horn v. Noel*, 1 *Cumb. N. P. Rep.* 61. *Price's Exchq. Rep.* 81. *Fenner v. Lewis*, 10 *Johns. Rep.* 38.)

2. That in the cases which had been cited, and in which the Court considered the judgments of Courts of other states as *prima facie* evidence only, the plaintiff came for the purpose of enforcing the judgment; but here the question as to the judgment arises *incidentally*, or *collaterally*, and, therefore, is to be regarded as final and conclusive. This is the true distinction, and is clearly laid down by Lord Ch. J. *Eyre*, in *Phillips v. Hunter*, (2 *Hen. Bl.* 402. 410.) "It is in one way only," he says, "that the sentence, or judgment of the Court of a foreign state, is examinable in our Courts; and that is, when the party who claims the benefit of it, applies to our Courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced, nor as obligatory to the extent to which, by our law, sentences and judgments are obligatory; not as conclusive, but as matter *in pais*, as consideration, *prima facie*, sufficient to raise a promise: we examine it as we do all other considerations of promises, and for that purpose we receive evidence of what *the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign Courts, and consider them as conclusive upon us." "The judgment, proper or improper, must stand." So, in *Meadows v. The Dutchess of Kingston*, (*Ambl.* 756. 761.) Lord *Apsley* makes the same distinction, and lays down the rule, "that wherever a matter comes to be tried in a *collateral* way, the decree, sentence, or judgment of any other Court, having competent jurisdiction, shall be received as conclusive evidence of the matter so determined." *Phillips*, also, in his treatise on evidence, which has been cited, lays down the same rule. (p. 243.) It is, therefore, wholly unnecessary, in this case, to question the decisions of this Court in cases where the party has brought his action here on the judgment of another state. But if it were necessary, we insist that the decision of the Supreme Court of the *United States*, in *Mills v. Duryee*, on that question, must be conclusive.

The legislature of *Vermont* has an undoubted right to regulate marriages and divorces, and full faith and credit are to be given to their public acts and decrees on the subject. The proceeding, in *Vermont*, was in a Court having both chancery and common law jurisdiction. We are not to presume that the legislature, or Courts of that state, will abuse their power.

THOMPSON, Ch. J., delivered the opinion of the Court. Every material question, in this case, turns upon the effect which

the *Vermont* divorce shall be deemed to have upon the former marriage of the defendant. If he was thereby absolved from the marriage contract with his former wife, his second marriage was lawful, and the plaintiff could not sustain the present action; nor could her daughter, who has been married to the defendant, be a witness. But if he was not legally divorced, his former wife being still living, his marriage with the plaintiff's daughter was illegal and void, and she was a competent witness.

The evidence in this cause shows, that when this divorce was obtained in *Vermont*, the defendant's former wife was living in *Connecticut*, separated from him, by virtue of an act of the legislature of that state, which, from its terms, may be deemed a divorce *a mensa et thoro*. This separation was to continue during the pleasure of the wife, and the defendant was subjected to the payment of 150 dollars, annually, to her, by way of alimony. It also appears from the case, that the defendant's former wife never was in the state of *Vermont*, nor in any manner personally notified or apprized, at the time, of the proceedings in *Vermont* to obtain the divorce. She did not, in any manner, by her agent, or attorney, appear, or make any defence against such proceedings.

The first question is, whether such proceedings, in *Vermont*, were not absolutely void. To sanction and give validity and effect to such a divorce, appears to me to be contrary to the first principles of justice. To give any binding effect to a judgment, it is essential that the Court should have jurisdiction of the person, and of the subject matter; and the want of jurisdiction is a matter that may always be set up against a judgment, when sought to be enforced, or where any benefit is claimed under it. The want of jurisdiction makes it utterly void, and unavailable for any purpose. The cases in the *English Courts*, and in those of our sister states, as well as in this Court, are very strong to show that judicial proceedings against a person not served with process to appear, and not being within the jurisdiction of the Court, and not appearing, in person, or by attorney, are null and void. In *Buchanan v. Rucker*, (9 East, 192.) the Court of K. B., in *England*, declared, that the law would not raise an *assumpsit* upon a judgment obtained in the island of *Tobago*, by default, when it appeared, on the face of the proceedings, that the defendant was not in the island when the suit was commenced, and that he had been summoned by nailing a copy of the declaration on the court-house door. The Court said, it would have made no difference in the case, if such proceedings were admitted to have been valid by the laws of *Tobago*. In the Supreme Court of *Massachusetts*, Ch. J. Parsons, in *Bissell v. Briggs*, (9 Mass. Rep. 464.) lays down the principle very clearly and distinctly, that before the adoption of the constitution of the *United States*, and in reference to for-

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eign judgments, it was competent to show that the Court had no jurisdiction of the cause; *and if so, the judgment, if set up as a justification for any act, would be rejected without inquiring into the merits. The same rule would apply where the party, in whose favor the judgment was, came to enforce it in another Court. He proceeds, very ably, to examine the question how far the judgments of Courts in sister states are made conclusive by the constitution; and contends, that neither the constitution, nor the act of Congress, prevents the Court, where such judgment is set up, from examining into the jurisdiction of the Court where the judgment was rendered; and such Court, he observes, must have jurisdiction both of the cause and of the person; that if a Court of any state should render a judgment against a man not within the state, nor bound by its laws, nor amenable to the jurisdiction of its Courts, it would be void.

So, also, the Superior Court of *Connecticut*, in the case of *Kibbe v. Kibbe*, (*Kirby*, 119.) refused to sustain an action on a judgment in *Massachusetts*, on the ground that the judgment debtor had not been personally served with process to compel his appearance in the original cause; and that, therefore, the Court, where the judgment was obtained, had proceeded without any jurisdiction of the cause. The same principle governed the decision of the Supreme Court of *Pennsylvania*, in the case of *Phelps v. Holker*, (1 *Dall.* 261.) The same doctrine has been repeatedly recognized in this Court. The cases of *Kilburn v. Woodworth*, (5 *Johns. Rep.* 41.) *Robinson v. Executors of Ward*, (8 *Johns. Rep.* 90.) *Fenton v. Garlick*, (8 *Johns. Rep.* 197.) *Pauling v. Bird's Executors*, (13 *Johns. Rep.* 192.) are abundantly sufficient to show the light in which we have viewed such judgments. We have refused to sustain an action here, upon a judgment in another state, where the suit was commenced by attachment, and no personal summons or actual notice given to the defendant, he not being, at the time of issuing the attachment, within such state. In such cases, we have considered the proceedings as *in rem*, which could only bind the goods attached, and that the judgment had no binding force *in personam*. This principle is not considered as growing out of any thing peculiar to proceedings by attachment, but is founded on more enlarged and general principles. It *is said by the Court, that to bind a defendant personally by a judgment, when he was never personally summoned, nor had notice of the proceedings, would be contrary to the first principles of justice; and that, whether the proceedings were valid, and according to the course of the Court in the place where such judgment was obtained, or not, would make no difference. It must, then, be taken, I think, as the settled law of this state, that a judgment obtained in a sister state against a person not being within the jurisdiction of the Court, nor having been

served with process to appear, nor having appeared to defend the suit, will be absolutely void. This principle must apply equally to a divorce, as to any other judgment. These are principles, too, that have been recognized and sanctioned in the state Courts under the constitution and law of the *United States*, as now existing. In the case of *Barber v. Root*, (10 *Mass. Rep.* 252.) Mr. Justice *Sawall*, in pronouncing the opinion of the Court, animadverts, with great indignation and severity, upon divorces obtained like the one set up in this case. The laws of *Vermont*, says he, which authorize the Supreme Court of that state to proceed in suits for divorce instituted in favor of persons resident, for a time, but having no settled *domicil* within the state, against persons resident and domiciled in other states, who are not, and never have been, amenable to the sovereignty of the state of *Vermont*, upon allegation of offences not pretended to have been committed within the state, or contrary to the peace, morals, or economy of the society there, or in violation of any contract subsisting, or which has ever been recognized there; in short, where no jurisdiction of the parties, or of the subject matter, can be suggested or supposed, are not to be justified by any principles of comity which have been known to prevail in the intercourse of civilized states; and the exercise of such authority, he adds, is to be reprobated in the strongest terms.

The case of *Mills v. Duryee*, (7 *Cranch*, 481.) in the Supreme Court of the *United States*, has been very much pressed upon us, as a binding and controlling decision, as to the conclusiveness of this divorce in *Vermont*. Although I have a very strong conviction, that the constitution of the *United States* and law of Congress cannot be applied to a judgment which we consider void upon the first principles of justice, so as to make it conclusive upon us, yet the very high respect I entertain for that Court, would make me hesitate, and doubt the correctness of my own judgment, did I believe it to have been the intention of that Court thus far to extend the construction of the constitution and laws of the *United States*. But I cannot persuade myself that it was so intended. And certain I am, that the case before that Court required no such construction. It is true, that some of the observations of the learned judge, who pronounced the opinion of the Court, might tend to such a conclusion. But these observations must be taken in reference to the facts in the case, and to the particular question before the Court. The case presented a question of pleading; whether *nil debet*, or *nul tiel record*, was the proper plea to an action of debt brought in the Circuit Court of the District of *Columbia*, upon a judgment rendered in the Supreme Court of this state. It was held that *nul tiel record* was the proper plea. It was said, that if the *record be conclusive between the parties*, it cannot be denied, but by the plea of *nul tiel record*; and that it was conclusive in that case, cannot be doubted. "The defendant,"

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says Mr. J. Story, "had full notice of the suit; for he was arrested and gave bail, and it is beyond all doubt, that the judgment of the Supreme Court of *New-York* was conclusive upon the parties in that state, and must, therefore, be conclusive here also." That case will very plainly admit of the construction, then, that it was intended only to decide, that the judgment was conclusive where the defendant was arrested, or had in some way appeared, and had an opportunity of defending the original suit. (a) This construction is fortified by what fell from Mr. J. Johnson, who dissented from the opinion of the Court. His remarks show very clearly that he did not understand the Court as deciding that they were bound to consider and carry into effect, as conclusive, judgments obtained upon attachments of property merely, when there was no process served on the defendant, within the jurisdiction of the Court rendering the judgment, or he made in some manner personally amenable to such jurisdiction.

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*I have thus far considered this case, upon the assumption, that this divorce would be valid and conclusive in the Courts in the state of *Vermont*, and should not even then deem it so here. But I very much question, whether it would be so considered in *Vermont*. It was a divorce obtained by *fraud* and false representations. In *Fermor's* case, (3 *Coke*, 77.) it was resolved, that a fine levied by fraud was not binding, and that such fraudulent estate was as no estate in judgment of law; and it was declared, that all acts and deeds, judicial as well as extrajudicial, if mixed with fraud, are void. This divorce was introduced by the defendant himself, upon his trial, for the purpose of showing that his former marriage was dissolved, so as to legalize his marriage with the plaintiff's daughter, and thereby exclude her from being a witness in the cause. Whenever he seeks to avail himself of any benefit from a divorce, procured by his own fraudulent conduct, although brought in collaterally, it would seem to me competent to allege this fraud, otherwise he would be permitted to derive a benefit from his own misconduct; a position altogether inadmissible. Under the *Vermont* law, *wilful desertion*, for three years, is one of the grounds upon which a divorce may be obtained. This, undoubtedly, implies *fault* and *misconduct*; a desertion in violation of duty, and of the legal obligations imposed by the marriage contract. It was under this part of the law that the defendant obtained his divorce. In his petition, presented to the Court for that purpose, he charges his wife with *wilful desertion for more than three years, and with a total neglect of duty*. This allegation, which was the sole ground of the divorce, was false, and known to be so to the defendant. For she was, then, and had been, for more than five years preceding, living in a state of separation from him, under the authority and sanction of an act of the legisla-

(a) Though the suit was commenced by attachment, if the defendant afterwards appeared, and took defence, the judgment is conclusive evidence against him in a sister state. 6 *Wheat*. 129. *Mayhew v. Thatcher et al.*

ture of the state of *Connecticut*, and by which it appears that both husband and wife appeared, and were heard before the legislature. The defendant must, therefore, have been fully apprized of the authority and circumstances under which his wife lived separate and apart from him; and could not have believed it a wilful desertion, within the sense and meaning of the *Vermont* law. If the validity of this divorce were to be agitated in *Vermont*, it might well be objected, that it was obtained on false suggestions, and in fraud of their law; and the principle which governed the decision of this Court, in *Jackson v. Jackson*, (1 *Johns. Rep.* 424.) would apply. It is there laid down, as a general principle, that whenever an act is done in *fraudem legis*, it cannot be the basis of a suit, in the Courts of the country whose laws are attempted to be infringed. If we are bound to give to this divorce the same force and effect that it would have in *Vermont*, we must certainly admit all objections to be urged against it that could be alleged in that state. Suppose an action should be brought in *Vermont*, by Mrs. *Fitch*, for her alimony, under the *Connecticut* law, could the defendant avail himself of his divorce, to show a dissolution of the marriage contract, so as to discharge himself from the payment? She certainly might set up this fraud against the divorce. Or, suppose a suit brought in this Court for the alimony, after the date of the divorce, and the divorce set up to avoid the payment; we should certainly be bound to give force and effect to the act of the legislature of *Connecticut*. That act was prior in point of time, and no want of jurisdiction could be set up, as both parties appeared before the legislature in *Connecticut*. The Courts in *Vermont* cannot have the power of annulling the law of *Connecticut*. It would be rather a singular situation of the defendant, and his first wife, to consider the divorce *a mensa et thoro* in *Connecticut*, and the divorce *a vinculo matrimonii* in *Vermont*, both in force, and binding on the parties at the same time.

Upon the whole, therefore, I am fully persuaded, that we cannot consider the defendant as lawfully divorced from his former wife; and, of course, his marriage with the plaintiff's daughter was null and void. Without noticing the objections urged in arrest of judgment, and about which there is no difference of opinion on the bench, I am of opinion that the plaintiff is entitled to judgment, on the bill of exceptions.

Judgment for the plaintiff.

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*VAN CLEEF and others *against* FLEET.

An inquisition taken by a sheriff on a claim of property, in goods levied on under an execution, is not conclusive of the right of property, although it may excuse the sheriff for not proceeding to sell, and for returning *nulla bona*. (a)

But if the plaintiff in the execution, offer, in writing, to indemnify the sheriff, he is bound to proceed and sell, and cannot excuse himself, by taking an inquisition.

When a debtor confesses judgment, and, afterwards, fraudulently purchases, and procures to be delivered, goods, without paying for them, with intention to subject them to the execution of the judgment creditor, the title to the goods does not become vested in the purchaser, and they, therefore, cannot be taken on an execution against him. (b)

THIS was an action on the case for a false return to a *fi. fa.* brought against the defendant, late sheriff of the city and county of New-York. The cause was tried before Mr. J. Platt, at the New-York sittings, in December, 1815.

Morris and Ryer executed to the plaintiffs a bond, conditioned for the payment of 8,000 dollars, and a warrant of attorney to enter up judgment thereon, which were dated the 26th of July, 1813, and judgment was entered on the 6th of August, on which day an execution was delivered to the defendant, and he was directed to levy the sum of 7,107 dollars and 70 cents. The defendant returned to the execution, that he had levied and paid to the plaintiffs the sum of 3,225 dollars and 4 cents, and as to the residue, *nulla bona*. It was admitted, on both sides, that other goods had been seized and taken, in the store occupied by Morris and Ryer, but which had been claimed by certain of their creditors, for whose benefit this suit was defended, and delivered up to them.

The defendant's counsel, at the trial, offered in evidence an inquisition, taken by the defendant, on the 20th of August, 1814, finding part of the property levied on to be the property of Schuyler and Bradford, two of the creditors of Morris and Ryer. This evidence was objected to on the part of the plaintiffs; and their counsel read a letter to the defendant, dated the 2d of September, 1813, in which they express their intention not to attend the trial of the claims of property before him, and conclude, "We have now again to desire you to proceed to the sale of the goods levied on, including those claimed by Schuyler and Bradford, and we are ready to indemnify you for so doing to your entire satisfaction. Should you decline to sell on the above terms, the refusal must be at your own peril, as must be whatever other steps you choose to take in this business; as we wish you distinctly to understand that we hold you responsible for the goods levied on, and in your possession unsold." The *judge overruled the objection, and the inquisition was admitted in evidence. The plaintiff's counsel then disclaimed any intention of charging the sheriff beyond the actual value of the goods; and when the inquisitions relative to the claims of the other creditors were offered in evidence, they were, on that ground, rejected by the judge. It was proved, on the part of the defendant, that several of the goods in question were purchased to be paid for, in cash, between the 26th of July, 1813, when the bond and warrant of attorney were dated, and the 6th of

(a) Vide *Hart v. Dermer*, 6 *Wendell's Rep.* 497. *Curtis v. Patterson*, 1 *Cow. Rep.* 65. *M'Farland v. Crary*, *Ibid.* 253. *Chapman v. Lathrop*, 6 *Cow. Rep.* 110.

(b) Vide *Hugue v. Seymour*, 5 *Wendell's Rep.* 309. *M'Farland v. Crary*, 6 *Ibid.* 297. *Monrey v. Walsh*, 8 *Cow. Rep.* 238.

August, when judgment was entered. It was also proved, that on a *Sunday* in *July*, or *August*, 1813, before the purchases from the different claimants, an inventory was taken, in the store of *Morris* and *Ryer*, by them, and *Moore*, one of the plaintiffs, and his clerk; that, afterwards, *Weed*, one of the claimants, sent his clerk to purchase a piece of goods that *Morris* and *Ryer* had before bought of him; that *Morris* asked a price which the clerk did not think proper to give until he had consulted with *Weed*; and after he went away, *Morris* put the goods into a drawer, and directed his clerk to tell *Weed's* clerk, if he returned, that he had sold them to *Moore*, who was then present; that on the 5th of *August*, *Lovel*, another of the claimants, repurchased of their clerk goods which he had sold to *Morris* and *Ryer*; and that *Moore* came to the store, and asked the clerk if he had sold goods to *Lovel*, to which on his replying that he had, *Moore* abused the clerk.

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The defendant's counsel offered to prove various sales between the 26th of *July*, and the 6th of *August*, for cash, but which was never paid; and offered other evidence of fraud in the transaction. The judge overruled the testimony, and declared that the frauds of *Morris* and *Ryer* could not affect the plaintiffs unless they were privy to them, or had combined to commit them, of which there was no evidence to go to the jury; and that he should charge the jury that, in judgment of law, the plaintiffs were entitled to recover. A verdict was taken for the plaintiffs, by consent, subject to the opinion of the Court.

Colden, for the plaintiffs. We are aware that the Court, *in *Bayley v. Bates*, (8 *Johns. Rep.* 185.) decided that the inquisition will excuse the return of *nulla bona*, where the sheriff acts *bona fide*; but the Court intimate, in that case, that if the sheriff should refuse an adequate indemnity offered by the plaintiff, he would be bound to proceed and sell, or be liable for a false return. Here was a written offer of indemnity, and the sheriff ought to have stayed proceedings on the writ of inquiry, until he had inquired whether the security offered was adequate. He has not acted with impartiality, or *bona fide*. If there was any fraud in *Morris* and *Ryers*, the plaintiffs were not privy to it.

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Hoffman, and *T. A. Enmet*, contra, relied on the case of *Bayley v. Bates*, the principles of which were fully recognized in *Townsend v. Phillips*. (10 *Johns. Rep.* 98.) They contended, that the power of calling a jury to inquire as to the property, is given to the sheriff merely for his protection, and for no other purpose: it is not intended for the benefit of the party. The inquisition, when taken, is perfectly conclusive as regards the sheriff. He is not bound to accept an indemnity, but certainly nothing short of the most ample security.

But, further, no property was vested in *Morris* and *Ryer*. The transaction was fraudulent, and the plaintiffs were privy to

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the fraud. In *Allison v. Matthieu*, (3 Johns. Rep. 235,) where goods were obtained fraudulently, and by collusion, under a pretence of purchase, the Court say, that the fraud avoided the contract of sale. (The counsel here discussed the facts in the case.) The plaintiffs were not *bona fide* purchasers. The sheriff was commanded to seize the goods of *Morris* and *Ryer*, and if the goods in question were not the property of *Morris* and *Ryer*, the plaintiffs could acquire nothing by the execution.

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Wells, in reply. The inquisition does not determine the question of property. It is a mere precautionary measure of the sheriff to protect himself from vindictive damages. The real owner, notwithstanding the jury of inquiry may find the property to be in the debtor, may bring his action against the sheriff, and if he proves his right to the *goods, he will be entitled to recover the full value of them from the sheriff. Then, if the inquisition be not conclusive when found in favor of the plaintiffs, why should it be so when found against them? There is no reciprocity nor consistency in making it a bar in one case, and not in the other. In *Townsend v. Phillips*, the Court say the plaintiff could not justify himself, by the inquisition, for taking goods which did not belong to the party against whom the execution issued. But if it is a bar, it must be so on certain conditions, or under certain circumstances; as, where the plaintiff has submitted to the inquiry, though he is not bound to do so, or where he is passive, and tells the sheriff to proceed at his peril. Not so, where he protests against a jury of inquiry, and tenders indemnity to the sheriff. In the case of *Bayley v. Bates*, it does not appear what was the indemnity offered. No doubt the Court must have considered it insufficient. If to a verbal offer of indemnity, the sheriff should answer, that he will take no security at all, the plaintiff clearly would not be bound to tender any, and the sheriff would proceed at his peril.

Again; the sheriff might have applied to the Court for instructions how to proceed. He might have filed a bill of interpleader. He might, even after the inquisition, have gone on and sold the property, and held the proceeds subject to the order of the Court.

It is true that fraud may be inferred from circumstances, but they must be such circumstances as lead irresistibly to that conclusion. Fraud is never to be presumed. The jury are not authorized to speculate and conjecture as to facts and motives. There was not enough shown to let the cause go to the jury, for the purpose of finding whether there was fraud or not.

VAN NESS, J., delivered the opinion of the Court. The inquisitions of the 2d of September were properly rejected, the plaintiffs having confined their claim of damages to the actual value of the goods. Such inquisitions are not conclusive on the question of property, though, in some cases, and under certain

qualifications, they will excuse the sheriff for not proceeding to sell and protect him from a *false return. This was so decided in the case of *Bayley v. Bates*; (*Johns. Rep.* 185.) but it is there strongly intimated, that if the sheriff should refuse an adequate indemnity, the Court would hold him bound to proceed and sell. Many of the cases cited in *Bayley v. Bates* show, that if the plaintiff in the execution tender an indemnity to the sheriff, it is his duty to proceed. It would be intolerable to consider these inquisitions as decisive of the right of property, considering the manner in which they are taken; and the great abuse to which such a proceeding is liable. I well recollect that, in the case of *Bayley v. Bates*, the offer to indemnify the sheriff was verbal, and very loose and unsatisfactory, and not such as the sheriff had a right reasonably to exact; and that it was for that reason the sheriff was held to be excused for returning *nulla bona* after he had held an inquest. Here the tender of indemnity was made in writing, with all due solemnity, and in such a way as ought to have induced the sheriff to proceed in the sale.

The evidence of fraud in *Morris* and *Ryer* was very strong, and there was, also, some evidence to show that *Moore*s, one of the plaintiffs, was privy to it. I think there was sufficient evidence to entitle the defendant to the opinion of the jury upon it, and that the learned judge should have submitted this part of the case to them. It was by no means so clear a case for the plaintiffs as to entitle them, "in judgment of law," to a verdict. On this ground, without noticing some minor points which have been discussed, I think that there ought to be a new trial.

It may be proper, however, to remark that if, on a future trial of this cause, the jury shall be satisfied that *Morris* and *Ryer* obtained the goods in question by fraud, that then, according to the doctrine established in the case of *Allison v. Matthieu*, the title to the goods never was vested in them, and they, consequently, were not liable to be taken in execution to satisfy the judgment in favor of the plaintiffs.

New trial granted, with costs, to abide the event of the suit.
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Where a defendant, taken in execution, is discharged from imprisonment, under the act for the relief of debtors, with respect to the imprisonment of their persons, and is afterwards sued upon the original judgment, he must, if he intend to avail himself of his exemption from imprisonment, plead it, and his omission to plead it is a waiver of his privilege; and if imprisoned again on another execution, in a suit founded on the original judgment, his discharge is no justification in an action against the sheriff for an escape; and even if such subsequent execution were voidable,

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the sheriff cannot avail himself of the error.

(a)

It seems that the *habeas corpus* act does not apply to cases of imprisonment on civil process.

(b)

But where a defendant in execution is discharged from imprisonment, under the act for the relief, &c., and is again imprisoned on an execution issued in a suit founded on the original judgment, a judge, or commissioner, has no authority to discharge him under the *habeas corpus* act, and a discharge granted under such circumstances is no protection to the sheriff, in an action for an escape. (c)

(a) *Jones v. Cook*, 1 *Creen*, 309.

(b) *Acc. U. States v. Jenkins*, 18 *Johns. Rep.* 305.

(c) *Vide Saracool v. Broughton*, 5 *Wendell's Rep.* 170. *Van Steenburg v. Bigelow*, 3 *Ibid.* 42. *Trotter v. Mills*, 6 *Ibid.* 512. *Relyea v. Ramsay*, 2 *Ibid.* 602.

*CABLE against COOPER.

THIS was an action of debt brought against the defendant, sheriff of the county of *Oneida*, for the escape of one *Azor Brown*. The cause was tried before his honor the chief justice, at the *Oneida* circuit, in June, 1817.

The plaintiff brought an action, in this Court, of debt, on a judgment recovered by him in the Mayor's Court of *Albany* against *Brown* and *Colberth*: *Brown* only was taken on the *capias*, and judgment was rendered by default, in August term, 1816, for 186 dollars and 19 cents, the amount of the judgment in the Mayor's Court, and costs. A *test. ca. sa.*, tested in August term, 1816, and returnable in October term thereafter, was issued, and delivered to one of the defendant's deputies, who, before the return day, arrested *Brown*, and committed him to the jail of *Oneida* county, where, or on the limits of the jail, he remained until discharged under a *habeas corpus*. The defendant produced in evidence the exemplification of the *habeas corpus*, the *test. ca. sa.*, and the proceedings thereon. The *habeas corpus* was allowed by *Nathan Williams*, Esq., the commissioner, residing at *Utica*, the 18th of October, 1816. It appeared, from these proceedings, that *Brown* was discharged from imprisonment on a *ca. sa.* issued by the plaintiff on the original judgment, in the Mayor's Court of *Albany*, in May, 1814, under the "act for the relief of debtors, with respect to the imprisonment of their persons," by the order of that Court; and the commissioner, on *Brown's* being brought up before him, by his order dated the 18th of October, 1816, directed *Brown* to be discharged from imprisonment on the execution issued out of this Court, upon the ground that he had been arrested *contrary to the act for the relief of debtors, &c. *Brown* was accordingly set at large.

A verdict was found for the plaintiff, subject to the opinion of the Court.

Foot, for the plaintiff. 1. In an action for an escape, the sheriff cannot take advantage of any error in the process. The process must be void, not merely voidable, to afford him a justification. (*Bissel v. Kip*, 5 *Johns. Rep.* 69. 100.) Whether the officer can justify or not, in an action against him for false imprisonment, is the test by which to determine whether he can permit the party to go at large, or not, after the arrest. If the

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process protects him, he is bound to keep the prisoner. (1 *Wils.* 255. 2 *Saund.* 101. y. n. 2. *Comyn's Dig. Escape*, (C.) *Bac. Abr. Escape*, (A).) A sheriff may justify under every process issuing from a Court having jurisdiction. It is well settled, that a person privileged from arrest, by statute or common law, if arrested, cannot maintain an action for false imprisonment, unless the proceeding is declared void by statute. (*Reynolds v. Corp.*, 3 *Caines*, 267. *Tarlton v. Fisher*, *Doug.* 671. *Cameron v. Lightfoot*, 2 *Bl. Rep.* 1190. 1 *Tidd's Pr.* 183.) If a sheriff has process against a privileged person, he may serve it or not, but if he does arrest, he must keep his prisoner. (2 *Bulst.* 65.) By the second section of the act for the relief of debtors, &c. (1 *N. R. L.* 348. sess. 36. ch. 81. s. 2.) (a) a person discharged from arrest, under the act, is not liable to imprisonment again for the same cause; and it is declared lawful for any judge of the Court, out of which the process issued, to discharge him from custody, provided he enters an appearance, or gives a warrant of attorney to appear; and the 7th (b) section declares that the real and personal estate of such debtor shall remain liable for his debts. The statute evidently contemplates an action on the judgment under which the *ca. sa.* issued, in which the party is required either to endorse his appearance, or is arrested and gives bail. In the latter case, if he does not appear and plead the statute in avoidance, he waives his privilege from arrest on the final process. The holding the defendant to bail, is notice to the defendant that the plaintiff intends to call for his body to satisfy the debt; and if a *ca. sa.* is issued, the sheriff cannot say the judgment is erroneous, and permit the defendant to go at large. This case is manifestly different from that of *Ray v. Hogeboom*, (11 *Johns. Rep.* 433.) for the privilege in that case was not conditional.

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Again; the discharge of the prisoner in this case was void. The act (1 *N. R. L.* 425, 426. sess. 36. ch. 67. s. 20.) (c) gives no authority to discharge, where, on the return of the *habeas corpus*, it appears that the person is charged in execution. The judge, or commissioner, can only remand him. The allowance of the writ is a ministerial act. (*Yates v. Lansing*, 5 *Johns. Rep.* 232. 297.)

2. The process in this case was not illegal. It followed the judgment of a Court of competent jurisdiction. *Brown*, therefore, came within the exception in the third section of the *habeas corpus* act. He was a prisoner "in execution by legal process." A judge, in vacation, has no jurisdiction of such a case. (4 *Johns. Rep.* 354. 6 *Johns. Rep.* 508. 9 *Johns. Rep.* 420.)

Storrs, contra. *Brown* was privileged from arrest, by the statute, which declares that no person discharged from imprison-

(a) 2 R. S. 30.

(b) 2 R. S. 30. sec. '1.)

(c) 2 R. S. 563. 567, 568.

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ment under it, shall, at any time thereafter, be imprisoned for the same cause. He was not bound to plead the privilege. This is not the case of a party held to bail. His appearance only was endorsed. That there was a second judgment *can* make no difference. The act expressly applies to such a case, and by declaring that the defendant shall not be again imprisoned, prohibits the issuing a *ca. sa.* on such second judgment.

The act, (1 N. R. L. 426.) (a) which directs the prisoner to be remanded, does not take away the jurisdiction of the judge, if he had authority to issue the *habeas corpus*. The act is merely directory. The allowance of the writ is not a judicial act; but the judicial character commences when the writ is returned. (*Yates's case*, 4 Johns. Rep. 317.) A judge, in vacation, may issue a *habeas corpus*, in all cases where he has jurisdiction. The words of the act, (1 N. R. L. 324. sess. 36. ch. 57. s. 3.) (b) "in execution by legal process," refer to criminal process only. The whole act has reference *to persons charged for some criminal matter. The statute under which the commissioner acted, in this case, was, like the *habeas corpus* act, directory on the subject. The act of the commissioner, when he orders the discharge, is a judicial act; and if he acted judicially, there is an end to the question; for where the subject matter is within the jurisdiction of the Court, or judge granting the order or process, the officer is excused. (*Smith v. Shaw*, 12 Johns. Rep. 257. 10 Co. 77.) The arrest was void, and it was from that arrest that *Brown* was released, by the order of the commissioner. The defendant was, therefore, justified in obeying that order.

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VAN NESS, J., delivered the opinion of the Court. The defendant in the original action was bound to plead his discharge, if he wished to avail himself of his exemption from imprisonment for the same cause, secured to him by the statute. If he had been convicted of perjury in procuring his discharge, he was, notwithstanding his discharge, liable to be again imprisoned, either on the old judgment, or under a new judgment recovered upon the old one, in an action of debt; and if the discharge had been pleaded, the plaintiff might have replied to it such conviction, which would have been conclusive to bar him of his exemption. The privilege from imprisonment to which *Brown* was entitled under the statute, certainly might be waived, and the omission to plead the discharge in the proper time was a waiver.

The judgment was regular, both in form and substance, and authorized the execution that was issued upon it, and which would have been a complete justification to the sheriff, in case he had been sued for false imprisonment. There is no pretence for saying that either the judgment or execution was void.

(a) 2 R. S. ubi sup.

(b) 2 R. S. 567.

and admitting they were voidable, that is a point which the sheriff is not permitted to raise, and with which he has no concern. The sheriff is never allowed to allege error, either in the judgment or process, as an excuse for an escape; and if he arrests the party, he is bound to keep him until he is discharged by due course of law. To these points, the cases cited by the counsel for the plaintiff are full and decisive, particularly the two cases of *Reynolds v. Corp* and *Douglass*, (3 *Caines*, 267.) and *Prigg v. Alams* and others, (2 *Salk*. 674.) *Brown* must, therefore, be considered being in execution by legal process.

The next question is, whether the commissioner had a right to discharge him, and if he had no such right, yet, having actually discharged him, whether such discharge is a defence against this suit. It may well be doubted whether the statute gives to a judge or the chancellor, in vacation, a right to discharge a party imprisoned on *civil process*. If it were necessary to decide that question in this case, and for the first time, I should say it does not. (*Ex parte Wilson*, 6 *Cranch*, 52.) But admitting it to be settled, that the statute extends to cases of illegal imprisonment under civil, as well as criminal process, yet the power of the officers to whom the execution of it is committed, is special and circumscribed, and they are prohibited from granting a discharge whenever the party is "in execution by legal process." If these officers exceed their powers, or, in other words, if they discharge when they have no jurisdiction, their acts are void. If *Brown* was in execution by legal process, (and of which there cannot be the least doubt,) it necessarily follows, that the commissioner had no authority to discharge him. It was upon this ground that this Court decided that the discharge of *Mr. Yates*, under the *habeas corpus* act, was void. Much as I respect the commissioner who granted this discharge, it was, beyond all doubt, an interference wholly unauthorized. He had no power to declare either the execution or judgment void. He had no discretion in this case; for, according to the clear and unequivocal words of the statute, the moment he discovered that the prisoner was in custody, on a *ca. sa.* perfectly valid and regular, upon the face of it, his power to discharge him ceased, to all intents and purposes. The statute is peremptory, and he had nothing to do but to remand him. If this Court, on motion, would not have set aside the judgment and *ca. sa.* for any other purpose than to give the prisoner an opportunity to plead his discharge, how much more unauthorized was it for the commissioner to discharge him from custody, while both were in full force. The necessary consequence of these principles is, that the discharge is no excuse for, or protection to, the sheriff. If the discharge is void, it is as if it had never existed. This is a universal rule in regard to all things that are void. "Void things are as no things." (22 *Vin.* 13. pl. 17.) Every tribunal proceeding under special and limited powers decides at its peril; and hence it is

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that process issuing from a Court not having jurisdiction, is no protection to the Court, to the attorney, or the party, nor even to a ministerial officer, who innocently executes it. This is a stern and sacred principle of the common law, which requires to be steadily guarded and maintained. The sheriff, on this execution, would have had a right to retake *Brown*, if he had departed from his custody without his permission, or a new execution might have issued against him. On this point the case of *Jackson v. Smith*, (5 *Johns. Rep.* 112.) is express. If the commissioner had no jurisdiction in this case, his discharge had no more effect than if he had not been a commissioner at all. In the case of *Mr. Yates*, it never was doubted by any of the judges, either in this Court or in the Court of Errors, that if the judge who discharged him had no jurisdiction, that the discharge would have been void. The question there was, whether he had jurisdiction or not. Those who held that he had none, considered the discharge as a nullity, and that the party might be recommitted. Those who held that he had jurisdiction, of course, considered the discharge conclusive, and that it was equally so whether the judge, in the exercise of his discretion, had decided right or wrong, so long as he acted within the scope of his powers. The opinion of the Court, accordingly, is, that the plaintiff is entitled to judgment.

SPENCER, J., dissenting. I cannot concur in the opinion just pronounced.

If the commissioner had jurisdiction of the subject matter of *Brown's* imprisonment, and had a right to adjudicate on that point, it is entirely immaterial, as respects the defendant, whether the decision of the commissioner was right or not; the officer will be protected in yielding obedience to that decision.

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It appears to me that the case of *Yates v. The People*, * (6 *Johns. Rep.* 580.) settles these principles: 1. That our statute has a more extensive operation than the *British habeas corpus* act; in this, that whilst the *British* statute is confined to commitments for crimes and criminal matters, or the suspicion thereof, our act extends to, and gives, the chancellor, and a judge of the Supreme Court, in vacation, cognizance of cases of imprisonment, generally, without confining their jurisdiction to commitments for criminal, or supposed criminal cases; in short, that our *habeas corpus* act purposely changed the phraseology of the stat. 31 ch. of *Charles II.*, with the view of extending it to all cases of persons imprisoned or restrained.

2. That the inhibition, in the third section of our statute, of the benefit of the writ "to persons convict, or in execution by legal process," necessarily refers it to the chancellor, or judge, having power to award the writ, to decide whether the party applying is in execution by *legal process*; for if he be in execution on illegal process, there exists no inhibition to allow the writ. If the first proposition is correct, that our statute extends

the benefit of the *habeas corpus* to all cases of imprisonment, and excepts out of the grant of power the case of a person in execution by legal process, it appears to me, that the exception is to be construed in its whole extent, and that it does not, and cannot, embrace the case of an imprisonment in execution on *illegal process*. The validity and legality of the process becomes the very *gist* of the inquiry; and to this the jurisdiction of the judge must extend. Indeed, it seems to me a very alarming proposition, that there exists no method of enlarging a person, but in term time, who may be committed upon an execution against his body, and which may be issued without any judgment to warrant it. If this be so, then the most flagrant violation of personal liberty may take place without the power of an immediate corrective. I feel no disposition to enlarge on points which I conceive to have been settled in the case of *Yates v. The People*, in the Court for the Correction of Errors. I am not aware that that case has been, in any degree, shaken or impaired, by any subsequent decision.

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Judgment for the plaintiff.

***MARY COLES, Administratrix of STEPHEN COLES,
against WILLET COLES.**

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THIS was an action of *assumpsit* for money had and received. The cause was tried before Mr. J. Yates, at the *New-York* sittings, in November, 1816.

It was proved, on the part of the plaintiff, that in January, 1813, *Stephen Coles*, deceased, and *Willet Coles*, the defendant, sold and conveyed to one *Meinell*, two lots of ground in *Ferry street*, in *New-York*, for 9,000 dollars, of which sum the purchaser paid 7,000 dollars into the hands of the defendant, and with the remaining 2,000 dollars paid off a mortgage on the premises, which had been given for the individual benefit of the defendant. The plaintiff, also, gave in evidence the following letter from the defendant to the intestate, dated *New-York*, December 29th, 1812.

"Dear Father. Brother *Stephen* has returned, and informs me that he left the deed that you gave him for the house and

When real estate is held by partners, for the purposes of the partnership, they do not hold it as partners, but as tenants in common, and the rules relative to partnership property do not apply in regard to it; therefore one partner can only sell his individual interest in the land, and when both partners join in a sale and conveyance, and one only receives the purchase money, the other part

ner may maintain an action against him for his proportion.

Where tenants in common sell and convey land, and one only receives the purchase money, the other may maintain an action of *assumpsit* against him, for money had and received, to recover his proportion of the price. (a)

(a) *Sherman v. Ballou*, 8 Cow. Rep. 304. *Baker v. Wheeler*, 8 Wendell's Rep. 505. And see *Gould v. Gould*, 8 Cowen, 168.

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still-house with you: to make the conveyance lawful, it is absolutely necessary that the deed should be recorded here. I have no other object in wishing the property conveyed to *Stephen*, than to secure you a comfortable maintenance. The failure of *H. F.* may put it out of my power to do so in any other way; please, therefore, to send the deed by the first opportunity. I have had an application to buy the still-house, for 9,000 dollars: if you think it best, I will do so, and put the money in bank stock: you may rely on my wish to see you provided for, let whatever may happen to your affectionate, but unfortunate son, &c. P. S. I shall convey my part to *Stephen* for your use also. Don't forget to send the deed."

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A partnership had existed between the intestate and defendant, in relation to the business of the still-house; and business had been carried on under the partnership name to about the time of the sale, although it appeared that the defendant *had, long before, been requested by the intestate to give notice of dissolution, but which he had, in fact, never done.

The counsel for the defendant moved for a nonsuit, on the ground that this was a partnership transaction, and required the investigation of partnership accounts. The motion was overruled by the judge, and further evidence was produced on the part of the defendant, to show the existence of a partnership down to the time of sale. The judge charged the jury, that, in his opinion, the letter from the defendant to the intestate was sufficient ground for the jury to find a verdict for the plaintiff for the half of the 9,000 dollars, with interest; and a verdict was found accordingly.

The defendant moved to set aside the verdict, and for a new trial.

T. A. Emmet, for the plaintiff.

R. Bogardus, contra.

Per Curiam. The motion for a new trial must be denied. The testimony on the part of the plaintiff shows, very satisfactorily, that the intestate was only entitled to a moiety of the land sold, and he can, of course, claim only one half of the consideration money. The letter of the 29th of *December*, 1812, might admit of a construction that the intestate was the sole owner of the land. But the other proof, and the conveyance which was given by both *Stephen* and *Willet Coles*, show, beyond any reasonable doubt, that they were joint owners or tenants in common.

It is to be inferred from the case that the mortgage for 2,000 dollars, was upon this land; though that is not very clearly stated. The defendant, at all events, admitted that this mort-

gage was his own private debt, and no part of it ought, of course, to be paid out of that portion of the consideration money due to the intestate, *Stephen Coles*. The defendant is, therefore, bound to account to the plaintiff for the one half of the 9,000 dollars, (the full amount of the consideration,) together with the interest from the time it was received.

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*No objection can be made to the recovery, on the ground of any existing partnership between *Stephen* and *Willet Coles*. They were tenants in common, not partners, in this land. The principles and rules of law applicable to partnerships, and which govern and regulate the disposition of the partnership property, do not apply to real estate. One partner can convey no more than his own interest in houses, or other real estate, even where they are held for the purposes of the partnership. (*Wats. Partners*. 67.) There may be special covenants and agreements entered into between partners, relative to the use and enjoyment of real estate owned by them jointly, and the land would be considered as held subject to such covenants; but nothing of that kind appears in the present case; and, in the absence of all such special covenants, the real estate owned by the partners must be considered and treated as such, without any reference to the partnership. These are principles fully established by the cases of *Thornton v. Dixon*, (3 *Brown's Ch. Rep.* 199.) and *Ba'main v. Shore*, (9 *Ves. jun.* 500.) *Willet* and *Stephen Coles* must, therefore, be considered as tenants in common of the lands sold and conveyed by them; and there can be no doubt, that where two tenants in common sell and convey their land, and all the money is received by one, the other can maintain an action for money had and received, for his moiety, against the other.

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Motion for new trial denied.

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*PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY against OSGOOD and others.

A voluntary conveyance by a grantor, who is, at the time of making it, insolvent, is void, as respects creditors; and the land, after the death of the grantor, is assets by descent or devise, in the hands of his heirs or the devisees of the residuum of his estate, in an action by the creditor against the heirs and devisees; and where some of the defendants were also the executors of the grantors, and petitioned the surrogate for the purpose of obtaining a sale of the real estate of the grantor, on account of an alleged deficiency of personal assets, this is evidence as against all the defendants, to show the insolvency of the grantor.

(a) Discounting a note at the rate of seven per cent. is not usury. (b) [* 163]

THIS was an action of *assumpsit* on two promissory notes, made by *Walter F. Osgood*, and endorsed by *Maria Osgood*, against the defendants, as her representatives, who were all either her children, or the husbands of such of her daughters as were married. The defendants, *De Witt Clinton*, and *Maria* his wife, *John L. Norton* and *Sarah* his wife, and *Hannah Clinton*, pleaded *riens per descent*, and the plaintiffs took judgment of assets, *quando acciderint*. The other defendants, *Walter F. Osgood*, *Edmund C. Genet* and *Martha B.* his wife, *Samuel Osgood* and *Juliana* his wife, pleaded the general issue, and also, as to the said *Walter*, *Martha*, *Juliana*, and *Susan*, *riens per descent or devise*, to which the plaintiffs replied assets at the time of the commencement of the suit by descent and devise. The cause was tried before Mr. J. Van Ness, at the New-York sittings, in December, 1816.

Samuel Osgood, the elder, was seised of several houses and lots of land in the city of New-York, and made his will, dated the 8th of February, 1792, by which he devised to his wife, *Maria Osgood*, all the estate, both real and personal, of which he was then possessed, or might be possessed, at the time of his disease, and appointed her his sole executrix. He afterwards purchased some lots of land at *Greenwich*, and died on the 23d of August, 1813. *Maria Osgood* was, before, and at the time of the death of her husband, seised in her own right of three several houses and lots of land situate in the city of New-York, which she conveyed by three several deeds, bearing date the 31st of May, 1814, in consideration of love and natural affection, to her three daughters, the defendants, *Martha B.*, *Susan K.*, and *Juliana*, respectively.

The notes in question were dated, one, the 25th of July, 1814, for 6,000 dollars, payable in 90 days, which was discounted *by the plaintiffs, at the rate of 7 per cent.; the other, the 10th of August, 1814, for 500 dollars, payable in 60 days, and discounted at the rate of 6 per cent. *Maria Osgood* made her will on the 27th of July, 1814, by which, after several specific bequests of money and chattels, she devised the residue of her real and personal estate to her children, the defendants, *Martha B.*, *Juliana*, *Walter F.*, and *Susan K. Osgood*, and appointed the defendants, *Walter F. Osgood*, *Samuel Osgood*, and

(a) *Wood v. Jackson*, 8 Wendell's Rep. 16. *Seaward v. Jackson*, 8 Cowen, Rep. 406. S. C. below, 5 Cowen, 67. *Mackie v. Cairns*, Id. 547. *Jackson v. Hooker*, 7 Cowen, 301. *Leas. of Hinde v. Longworth*, 11 Wheat. 219. *Sexton v. Wheaton*, 8 Id. 229.

(b) *Bank of Geneva v. Howlett*, 4 Wendell's Rep. 323. *Bank of Utica v. Phillips*, 3 Ibid. 408. *Same v. Wager*, 8 Conn. Rep. 393. S. C. 2 Id. 712. N. Y. Ins. Co. v. *Sturges*, 2 Id. 664. Id. v. *Ely*, Ibid. 678.

Elmund C. Genet, her executors. The testatrix died on the 8th of December, 1814, and the notes, which afterwards fell due, remained unpaid.

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A variety of evidence was produced at the trial, to show, that, at the time of the conveyances to her daughters, *Mrs. Osgood* was insolvent; and for that purpose, the plaintiffs also produced the petition of her executors to the *surrogate* of the city and county of *New-York*, stating that the personal estate of the deceased was insufficient to pay her debts, and requesting the aid of the *surrogate* in the premises, pursuant to the statute in such case made and provided: a statement of the estate was annexed to the petition, and which was sworn to by the executors; but before any order was made, they declined proceeding further, alleging that they had acted under a misapprehension. The admission of this testimony was objected to on the part of the defendants, but was allowed by the judge. A considerable part of the debts of the testatrix consisted of endorsements for the accommodation of *Walter F. Osgood*.

The judge charged the jury that the deeds from *Mrs. Osgood* to her daughters were, on the face of them, voluntary; that the evidence left little doubt that she was, at the time, insolvent; that the deeds were null and void as against creditors; that they were to be deemed, as regarded the plaintiffs, assets, by descent or devise, under the issue joined on the plea of *riens per descent or devise*, in the hands of the defendants who were parties to that issue; and that the notes on which the suit was brought were neither of them usurious or void. The jury found a verdict for the plaintiffs, for the amount of the notes, with interest. A motion was made to set aside the verdict, and for a new trial.

**Cowdry*, for the defendants. 1. The petition and schedule presented to the surrogate were not admissible, to show that *Mrs. Osgood* was indebted, at the time. They were not the best evidence which the nature of the case admitted. The original bonds and notes ought to have been produced, by which it would have appeared, that most of the debts were those of *Mr. Osgood*; and his debts ought to be taken into consideration, in determining whether the conveyances were voluntary or not. The statement made by one of the heirs ought not to be binding on the others. It is analogous to a bill in chancery, on which no proceedings have been had, which is not evidence. (*Bull. N. P.* 235. *Gilb. Law of Ev.* 49.) The answer in chancery of a co-defendant is no evidence against the others.

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2. The houses and lots of land conveyed by *Mrs. Osgood* are not to be considered as assets by descent. If the statement is rejected, there is no evidence that she was largely indebted at the time of the conveyance. She owed 22,000 dollars, which was amply secured by mortgages on property, of the value of

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47,000 dollars. Her endorsements of the notes were, at most, *contingent* debts, and might never become certain. The maker of those notes was, at the time, perfectly solvent. Subsequent debts are not to be taken into consideration, in case of settlements, or conveyances, by way of family provision. (*Rob. on Fraud. Conv.* 18, 19, 24, 451, 452, 453. 1 *Bro. C. Rep.* 50. 2 *Atk.* 13. 3 *Co.* 81. *b.* 2 *Ves.* 10. *Amb.* 598. 2 *Ver.* n. 491.)

3. The notes were usurious and void. If a person receives illegal interest before it is due, and this is made part of the original contract for the loan, it renders the security void. (*Ord on Usury*, 102. *Floyer v. Edwards, Courp.* 114. *Cro. Jac.* 26.)

4. The charge of the judge was incorrect. Whether the original contract was a loan of money on receiving the discount or not, was a question of fact for the jury to decide; but the judge charged the fact positively, that the notes were not usurious or void. (*New-York Fire Insurance Company v. Walden*, 12 *Johns. Rep.* 613. 1 *Bos. & Pull.* 144.)

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**Slosson and T. A. Emmet, contra.* All the estate of Mr. *Osgood* is devised to his wife, who is made sole executrix; and she is the legal debtor, in respect to the estate devised to her. His debts, therefore, must be taken into consideration, on the inquiry into the effect of a voluntary conveyance. Mrs. *Osgood* died largely indebted. [Here the counsel entered into an examination of the statement and accounts given in evidence, by which it appeared that she owed, at the time of her death, beyond the amount of her estate, above 29,000 dollars; and, including the bonds, about 42,000 dollars.] Even if the petition and statements exhibited to the surrogate are rejected, there is sufficient evidence of the insolvency of Mrs. *Osgood*. Admissions which go to charge the persons making them, are evidence as to third persons. (*Phillips's Ev.* 191, 192, 193. *Doe v. Robson*, 15 *East*, 33.) The petition was presented by the legal representatives, the executors of Mrs. *Osgood*. She ordered her executors to pay all her debts. It was their duty so to do, and for that purpose they applied to the surrogate for an order for the sale of the real estate. Precise evidence of the insolvency, or indebtedness, is not requisite; it being merely a collateral fact. If a person greatly indebted makes a voluntary conveyance to his children, his being in debt at the time is evidence of legal fraud, which vitiates and avoids the conveyance, to all intents and purposes, as against his *creditors*. A total insolvency need not be shown. Such conveyances, being to delay, hinder, and defraud creditors, are void as to them. In such case, the law adjudges the legal estate to remain in the debtor, so as not to pass under the devise, or voluntary conveyance. It is immaterial whether the debt is as principal or surety, as maker or endorser, or whether due or to grow due. The object of the statute against fraudulent conveyances is, to keep the estate of

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the debtor for his creditors, and for them only; avoiding the conveyance as respects them, but leaving it to stand as to other persons, (*Twine's case*, 3 C. 81. b. 5 Co. 60. 2 *Vesey*, 11. 1 Atk. 15. 1 *Vesey*, 27. Rob. *Fraud. Conv.* 17, 18. 459, 460.) The fraud need not be pleaded. The lands conveyed become *assets* in the hands of the heir. (*Dyer*, 295. b. p. 16. *Jink.* 295. case, 45. *Shep. Touch.* *65, 66. 2 *Saund.* 7. n. 4. Rob. *Fraud. Conv.* 596.) The only case which countenances a contrary doctrine is that of *Parslow v. Weedon*, in 1718, (1 *Ej. Cas. Abr.* 149. s. 7.) determined by Lord *Macclesfield*, whose decision excited great surprise and dissatisfaction among the bar at the time. That case is not regarded as authority, but as a *dictum* merely of Lord *Macclesfield*, (*Prec. Ch.* 520. note. *Jones v. Marsh*, *Cases Temp. Talbot*, 64.) In *Jackson v. Burgett*, (10 *Johns. Rep.* 457. 463.) the Court say that no estate passes to the purchaser by the fraudulent deed. "Such fraudulent estate is as no estate in judgment of law." Where a devise is to an heir, he may be charged both as heir and devisee. (2 *Saund.* 7. n. 4.)

Discounting a note at the legal rate of interest is not *usury*. In *Lloyd v. Williams*, (2 *Wm. Bl.* 792.) *Blackstone*, J., said that interest might as lawfully be received beforehand, for forbearing, as after the term had expired, for having forborne; and that it was not to be reckoned as merely a loan for the balance; otherwise, every banker in London who takes five per cent. for discounting bills, would be guilty of *usury*. The act passed at the last session, allowing banks to discount notes for more than 60 days, at 7 per cent., shows the sense of the legislature on this point. Discounting is merely deducting the interest from the amount, at the time of the loan. (1 *Bos. & Pull.* 144. 2 *Term Rep.* 52. 1 *Campb. N. P. Rep.* 177. 2 *Campb. N. P. Rep.* 33.)

S. Jones, jun., in reply, insisted that if the answer of one defendant in chancery did not charge his co-defendant, by parity of reasoning, the admission of one heir could not charge his co-heirs.

That in estimating the amount of debts, the bonds and mortgages cannot be taken into the account.

But whatever may be the effect of the conveyance, it so far changes the legal descent of the property, that the defendants cannot be charged, as heirs, for *assets by descent*. The case of *Parslow* and *Weedon* has never been overruled. The deed was not absolutely void, but merely voidable. If the grantee had sold the land to a *bona fide* purchaser ignorant of the fraud, such conveyance would be valid. (a) The deed is good against the parties, and the heirs and devisees of the grantor, and against creditors, until they come in to set it aside. At the time of Mrs. O.'s death, there was no question as to

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(a) See *vide Hildreth v. Sands*, 2 *Johns. Ch. Rep.* 35.

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the validity of the conveyance. In *Jackson v. Burgott*, the grantor was still living. Besides, Mrs. O. does not devise these lots to her children, but recites these conveyances, and then devises the residue of her estate. The grantees did not take as heirs, for there were other children.

If it is part of the contract to pay the interest in advance, it is usury. A person may lawfully stipulate for the payment of interest weekly; for then there is no interest paid, until after forbearance.

YATES, J., delivered the opinion of the Court. The executors, as the legal representatives of the deceased, had exhibited the statement under oath, and filed it, with the petition, in the surrogate's office, with an intention of obtaining an order to sell the real estate, but which was, afterwards, abandoned. It appears to me that the executors, of all others, were the best informed on the subject, and were competent to make admissions sanctioned by their oaths; particularly as to a collateral fact. Those documents were, therefore, properly admitted in evidence, (a) as stated in the case, for the purpose of showing the testator's indebtedness, on the 31st of May, 1814; and unless a mistake had been made in the statement, which might have been shown on the trial, it must be entitled to great weight. (1 *Phillips's Ev.* 192. 15 *East*, 34, 35. 4 *Johns. Rep.* 461.) The executors were certainly competent to know the fact, and the evidence appears to me to be the highest of which the nature of the case is susceptible. It goes to show, most decidedly, the fact of insolvency at the date of those deeds; nor would the result be different, if the estate of the husband, and the bonds alleged to be executed by him, were excluded. It is evident, then, that the situation of Mrs. Osgood, at the date of those conveyances, rendered them void, as regards the plain facts in this cause; and the law is well settled, that if a party executes a voluntary conveyance, indebtedness, at the time, is evidence of fraud; and where such indebtedness is to the extent shown in this case, it is sufficient to render the conveyances inoperative and void, as to creditors.

That part of those debts had originated in consequence of endorsements by Mrs. Osgood, for her son, does not alter the case, in construction of law; and the testimony clearly shows that she could not have been solvent at that period; and that long before the date of the conveyances, she was, from time to time, wholly dependent on her credit for funds. It was, then, illegal for her, while those embarrassments continued, to convey to her daughters. (3 *Coke*, 81. b. *Twine's case*, 1 *Atk.* 15. 94. & *Atk.* 600.)

If, then, those conveyances were fraudulent and void, the fee remained in Mrs. Osgood, and, as to her creditors, it was the

(a) *Vido Johnson v. Beardslee and others*, ante, p. 3.

same as if she had never conveyed. (3 Rep. 78. b. *Dyer*, 295. pl. 16.) The title to the estate must, consequently, be governed by her last will and testament, by which, after sundry bequests and legacies, she devises to her children, parties to this issue, all the rest of her estate, both real and personal. The lots for which the void conveyances were given constitute a part of that residue, and, of course, must be held by them under this devise, and be equally liable for the payment of the debts of the deceased, with the other real estate of which she died seised, and are *assets* by devise.

There is no ground for the allegation that the notes are usurious, for it cannot be questioned that it has been the uniform practice of all banking institutions, since their establishment, to exact the payment of interest in advance; and it would be an alarming principle to introduce, that all paper thus held should be usurious and void. The law, however, does not require such a decision. It supports a different and more salutary principle, and more conducive to mercantile convenience, by allowing bankers to receive the interest in advance. (2 Bl. Rep. 792. 1 Bos. & Pull. 144. 2 Term *Rep. 52.) The Court are, therefore, of opinion, that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

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JACKSON, *ex dem.* LIVINGSTON and others, *against*
ROBINS.

THIS was an action of ejectment for lands in the town of *Walkill*, in *Orange* county. The cause was tried before his honor the chief justice, at the *Orange* circuit, in *September*, 1815.

The special verdict stated, that on the first of *January*, 1771, *William Alexander*, commonly called *Lord Stirling*, was seised of a certain tract of land of about 3,000 acres, in the county of *Ulster*, now in *Orange* county, of which tract the premises in question are part. *Lord Stirling* died seised, in the spring of 1783, after having made his will, dated *January* 29th, 1780, which contained the following devise: "I give, devise, and bequeath, all my real and personal estate whatsoever, unto my dear wife *Sarah*, to hold the same to her, her executors, administrators, and assigns, but in case of her death, without giving, devising, or bequeathing by will, or otherwise selling or assigning

Where *A.* devises all his estate to *B.*, his wife, her executors, administrators, and assigns, but in case of *B.*'s death, without disposing of it by will or otherwise, then to his daughter, *B.* takes, under the devise, the entire fee, and the subsequent limitation to the daughter is consequently void. (a)

Where an adverse possession has commenced by the title de-

in the lifetime of the ancestor, the operation of the statute of limitations is not prevented according to a person under legal disability, as a *feme covert*, &c.

(a) Vide *S. C.* 16 *Johns. Rep.* 537.

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the said estate, or any part thereof, then I do give, devise, and bequeath, all such estate, or all parts thereof as shall so remain unsold, undevised, or unbequeathed, unto my daughter, Lady *Catharine Duer*, the wife of the Honorable *William Duer*, Esq., of the state of *New-York*, to hold the same to her, her executors, administrators, or assigns." *Catharine Duer*, who, after the decease of her husband, *William Duer*, married *William Neilson*, and *Mary*, the wife of *Robert Watts*, were the daughters and co-heiresses of the testator. Lady *Stirling*, died in *March*, 1805. In 1771, *Anne Waddell* recovered a judgment in the Supreme Court of the province of *New-York*, against Lord *Stirling*, for 7790^l. debt, with damages and costs. In 1775, the executors of *Anne Waddell* revived this judgment by *scire facias*; and after the death of Lord *Stirling*, in *October* vacation, 1787, they again issued a *scire facias* against the heirs and terre-tenants of Lord *Stirling*, whereon *Robert Watts*, and *Mary*, his wife, and *Catharine Duer*, the heirs of Lord *Stirling*, alone were summoned, and in *January* term, 1788, judgment passed against the persons thus summoned, by default; a *fi. fa.* was issued to the sheriff of *Ulster*, under which he sold the premises in question, with other lands, to *John Taylor*, and executed to him a deed, dated the 10th of *June*, 1788. On the 30th of *April*, 1794, *Taylor* granted the premises to *Harlowe*, who entered and took possession. *Harlowe* afterwards conveyed them to the defendant's father, from whence they descended to the defendant as his heir at law.

This cause was argued at a former term, by *J. Duer* for the plaintiff, and *J. Emott*, and *S. Jones, jun.*, for the defendant; and, again, in *October* term last, by *Duer* and *T. A. Emmet*, for the plaintiff, and *S. Jones, jun.*, and *Slosson*, for the defendant. (a)

Several of the points discussed in this cause were, also, raised, in the case of *Jackson, ex dem. Livingston, v. Delancey*, (11 *Johns. Rep.* 365—376.) which was affirmed in the Court of Errors. (13 *Johns. Rep.* 537—560.)

The plaintiff's counsel contended, 1. That *Catharine N.*, one of the lessees, had a right of entry on the premises in question, under the limitations contained in the will of Lord *S.*; and to show this, they insisted, that Lady *S.* took an estate *for life*, with power to sell or devise in fee, and that *Catharine N.* took in remainder; but admitting that the word *estate* in the will of Lord *S.* gave Lady *S.* the *fee*, yet there was a good *executory devise* to *Catharine N.* 2. That the right of entry of *C. N.* was not barred by the sale of the lands made by the sheriff of *Ulster*. 3. That her entry was not barred by the statute of limitations.

(a) The reporter did not hear the *second* argument, and as the Court did not enter into an examination of the points discussed, it is not thought necessary to state any part of the arguments of the counsel.

*PLATT, J., delivered the opinion of the Court. The plaintiff claims title under the will of Lord *Stirling*, bearing date the 29th of *January*, 1780, and which took effect at the death of the testator, in the spring of 1783.

By that will, the testator devised to Lady *Stirling* all his estate, real and personal, with an absolute and unqualified right in her to "*sell, devise, or dispose of it,*" at her pleasure; and the will further declares, that "in case of her death, without giving, devising, or bequeathing, by will, or otherwise selling or bequeathing the said estate, or any part thereof," then the testator gives to his daughter *Catharine Duer*, all such part of the estate as shall remain "*unsold, undevised, or unbequeathed*" by Lady *Stirling*.

In the case of *Jackson, ex dem. Livingston, v. De Lancey*, (13 *Johs. Rep.* 537—551.) the Court for the Trial of Impeachments and the Correction of Errors, on a point essential in the determination of that cause, expressly decided, that according to the true construction of this will, Lady *Stirling* took an estate in fee simple, absolute; and that the limitation over to *Catharine Duer* was not a good executory devise.

That decision sanctions the opinion of this Court in *Jackson v. Bull*, (10 *Johs. Rep.* 19.) and must be regarded, by us, as conclusive on that point.

Lady *Stirling* died in 1805, and the only title proved on the part of the plaintiff is, that *Catharine N.*, one of the lessors, is the daughter and heir of Lady *Stirling*. Mrs. *N.* can claim nothing *immediately* from her father, Lord *Stirling*, either as heir or devisee.

It appears that in *April*, 1794, *Harlowe* entered into actual possession of the premises in question, under a conveyance from *Taylor*, who purchased the land at the sheriff's sale on the 16th of *June*, 1788.

Whether *Taylor* acquired a valid title, under the proceedings by *scire facias* and the sheriff's sale, is a question which does not necessarily arise in this case. The possession taken under that purchase was, at least, under color of title, so as to constitute a possession *adverse* towards Lady *Stirling*, and all claiming under her. As the statute of limitations *began to run* in the lifetime of Lady *Stirling*, and had *overrun 20 years before the commencement of this suit, the coverture of Mrs. *N.* affords no protection to the title which she derived as heir of Lady *Stirling*.

The statute of limitations, therefore, bars the plaintiff's right of entry, and the defendant is entitled to judgment.

VAN NESS, J. Though I concur in the decision of the Court, yet I think proper briefly to explain the ground of my concurrence. The construction of the will of Lord *Stirling* was settled by the *Court of Errors*, in *Jackson v. Delancey*, and I am not at liberty to adopt a different construction. Were it not for that decision, I should have no difficulty in saying that Lady *Stirling*

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did not take a fee under the will of Lord *Stirling*, and that the judgments were not well revived by *sci. fa.* against Lady *Catharine Duer*. But a decision of the Court of Errors, directly on the point before the Court, in this cause, and which was necessary to the determination of the cause in that Court, must be binding on this Court.

Judgment for the defendant.

PAGE and others against LENOX and MAITLAND.

American goods were captured by the British, and carried into *Futa*, a Swedish island, but then in the possession of the British, and completely under their control, Sweden, at that time, being at war with Great Britain; the goods, while at *Futa*, were proceeded against as prize in the Court of Admiralty in England, and pending the proceedings, peace was concluded between Great Britain and Sweden, and the goods were, afterwards, condemned, without ever having been in Great Britain. Held, that the condemnation was legal, and devested the property of the original owners.

Whether a Court of admiralty sitting in one country can adjudicate upon property captured as prize of war, and taken into a neutral territory, and never coming within the jurisdiction of the Court? *Quære.*

Put it may adjudicate upon a prize carried into the ports of an ally in the war.

THIS was an action of *trover*, tried before Mr. J. Yates, at the New-York sittings, in November, 1816.

The agent of the plaintiffs purchased a large quantity of German linens at *Hamburg*, on the account, and with the funds of the plaintiffs, with which he proceeded from *Hamburg* with intention to transport them to *Copenhagen*, there to be shipped for the *United States*. The Danish sloop *St. Jorgen*, on board of which the goods were laden for *Copenhagen*, was obliged by adverse winds to put into a port in the Danish dominions, and while lying there was, on the 24th of May, 1812, cut out and captured by the boats of the British frigate *Helder*, and sloop of war *Bellette*. The sloop and her cargo were sent by the captors to, and about the middle of July arrived at, *Futa*, a small island near *Wingo* sound, and 16 or 17 miles west of *Gothenburg*, within the Swedish dominions, but at that time in the possession of the British, having been taken by Vice-admiral Sir James Saumarez, during the war between Great Britain and Sweden, which commenced in 1810, and was terminated by the treaty of peace signed by the ministers of the two powers on the 18th of July, 1812, and ratified by Sweden on the 16th of August, following. This island was used as a place of rendezvous by the British, for the prosecution of their commerce in the Baltic, and was held without the permission or consent of Sweden, although the war was merely nominal, Sweden having been forced into the contest by Napoleon. The intercourse between *Futa* and *Gothenburg* was unrestricted, and Swedish vessels passed the British fleet without molestation; but the island was still under the complete control of the British. Commissioners were established for the purpose of taking the examinations of the masters and owners of prizes brought in there, and forwarding them and the captured vessels to the judge of the Court of Admiralty in England. These commissioners had previously resided at *Gothenburg*, with the consent of the Swedish government; but on the breaking out of the war, transacted

their official business at *Futa*. Proceedings were instituted in the *English* Court of Admiralty against the *St. Jorgen*, and her cargo, while at *Futa*, (where, on her arrival, the preliminary examinations were taken by the commissioners, and with the papers were sent to *England*;) and they were condemned, on or about the 2d of *September*, 1812. After the condemnation, the captors sold the goods in question, being the greater part of the linens originally purchased by the agent of the plaintiffs at *Hamburg*, to one *Dickinson* of *Gothenburg*, who sold the same to *Low* and *Smith* of the *same place, by whom they were sent to *New-York*, consigned to the defendants.

A verdict was taken for the plaintiffs, for 50,000 dollars, subject to the opinion of the Court.

The case was argued, with great learning and ability, by *Wells* and *T. A. Emmet*, for the plaintiffs, and *D. B. Ogden* and *Hoffman*, for the defendants; but as the opinion of the Court was founded merely on the question of fact, that the island of *Futa* was not, at the time, neutral territory, but in the hostile possession of the *British*, and under the jurisdiction and control of the *British* forces, it is unnecessary to state the arguments of the counsel on the points raised in the cause.

THOMPSON, Ch. J., delivered the opinion of the Court.

The questions which have been made and discussed in this case are, 1. Whether, admitting the island of *Futa* to have been neutral territory, it was competent for a *British* Court of admiralty to proceed against and condemn the property in question, whilst lying at that place. If not, then, 2. Whether, in point of fact, *Futa* was not, at the time, so far a part of the *British* territory, or in the possession of Admiral *Saumarez*, as to render valid the condemnation. In the argument of the first question, we have been called upon to review some of the principles laid down by this Court in the case of *Wheelwright v. Depeyster*; (1 *Johns. Rep.* 479.) for although the principal question in that case was, whether a condemnation by a prize Court, established in a neutral country, was valid, yet the late chief justice, in pronouncing the opinion of the Court, went into an examination of the question, whether a prize Court in the belligerent country could proceed against a prize lying within the territory of a neutral power, and, upon a very able examination of the point, was of opinion that it could not. A contrary doctrine seems, however, to prevail in the Supreme Court of the *United States*, according to the case of *Hudson and others v. Guestier*. (4 *Cranch*, 293. 6 *Cranch*, 281.) The high respect we entertain for that Court, and the fitness and propriety of a uniformity of decision, especially on questions of this kind, might induce us again to turn our attention to *this question, if it had become necessary to the decision of the case before us. But thinking, as we do, that the condemnation was

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valid, on the other ground taken by the defendants' counsel, we forbear to touch the first point. The property in question, being a quantity of linens, was captured as prize, on board a *Danish* vessel, in *May*, 1812, by the *British* ship *Helder*, and in *July* following, carried by the captors into the harbor of the island of *Futa*, which is situated in *Wingo* sound, about 17 miles west of the city of *Gothenburg*, being one of the outermost *Swedish* islands. From the evidence, it is very satisfactorily established, that this island was some time before taken possession of by Vice-admiral Sir *James Saumarez*, in the name of his *Britannic* majesty, and held as a place of rendezvous, for prizes taken by the *British* fleet, and to facilitate *British* commerce; that the *British* flag was flying in the harbor, and that no other naval or military force was stationed there; that, in point of fact, and for every naval, military, and commercial operation, the island could only be considered a *British* station; that it was not then held barely by permission of *Sweden*, but was taken and held, as a hostile measure, war having been declared by *Sweden* against *Great Britain*, in the year 1810. This declaration of war was probably made under the coercion of the Emperor of *France*, and we do not find any active hostile operations carried on; yet there was an existing state of war between *Great Britain* and *Sweden*, when possession was taken of this island, and there was no testimony whatever, to show that such possession was taken or held by permission of the *Swedish* government. This question was pressed upon most, if not all of the witnesses who were examined, and no one pretended to say that such permission was ever asked or obtained. On the contrary, several of the witnesses state explicitly, that the island was taken possession of by the *British* admiral, and held as a place of rendezvous, on account of the then existing war between *Great Britain* and *Sweden*; and that this was without the consent and permission of the *Swedish* government. Commissioners were appointed and established there, by and under the authority of the *English* admiralty, for the purpose of taking the examinations and *depositions of witnesses, in the cases of prize vessels sent by *British* cruisers into this island. The commission was executed, at this place, under the protection of the *British* fleet there stationed, and without the consent of the *Swedish* government. We are fully warranted, from the testimony, in saying, that, from the time this island was taken possession of, no civil or military power was exercised there by the *Swedish* government, until after the treaty of peace, in *August*, 1812. Indeed, the case does not furnish us with any evidence, that this island was even then given up to *Sweden*; and the treaty of peace is entirely silent on the subject. (a) One of the witnesses speaks of its being in possession of *Sweden* at the time of his examination, which was in the year 1815. I

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(a) The treaty (art. 2.) recognized the *status quo ante bellum*.

have not thought it necessary to refer particularly to the evidence of the several witnesses who have testified in relation to the possession of this island. The proof is clear, that when the prize was taken and carried in for examination, the island was, to all intents and purposes, in the undisturbed possession of the *British*, and considered a station for their naval and commercial operations; and that it so continued until after the commencement of the admiralty proceedings, if not even down to the time of the condemnation, on the 2d of *September*, 1812. The time of the commencement of the admiralty proceedings does not, with certainty, appear; and it is not very important that it should, for the treaty of peace between *Great Britain* and *Sweden* may, perhaps, bear the construction of making the latter an ally of the former; and there can be no question but that a condemnation of prizes brought into the port of an ally would be valid. (2 *Rob.* 209. 1 *Johns. Rep.* 484.) This, however, is barely thrown out, without intending to place the cause, in any measure, upon the construction of this treaty.

If, in point of fact, then, the island of *Futa* was in the possession, and under the jurisdiction and control of the **British* forces, there certainly can be no objection to a *British* Court of admiralty proceeding against prizes brought in there. None of the reasons which may be urged against a prize Court proceeding to the condemnation of property, lying within the territory of a neutral power, can be applied to the case. The great objection to such proceedings is, that the *res ipsa* is not within the possession, and under the control of the Court, so that the sentence, or decree, could be enforced; the proceedings being *in rem*. But no such difficulty rests here. This prize remained not only in the possession of the captors, but at a place under the exclusive control of the sovereign of the captors. Here is all the possession necessary to give jurisdiction to a *British* Court of admiralty. On this ground, therefore, we think the condemnation valid, and the right of the plaintiffs to the property in question thereby devested, and that the defendants are, accordingly, entitled to judgment.

Judgment for the defendants.

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BUTLER *against* KELSEY.

A writ of inquiry of damages cannot be executed on a *Sunday*; nor can the jury, who have been impanelled on *Saturday*, and

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heard the allegations and proofs of the parties before 12 o'clock, at night, assess the damages and deliver their verdict to the sheriff on *Sunday*.

If the plaintiff has any objections to any of the jurors, he must make them openly, and if he state them privately to the sheriff, who thereupon discharges a juror, the inquisition will be set aside.

THIS was an action of slander, in which the defendant suffered judgment to be entered by default, and, on a writ of inquiry executed before the sheriff of *Dutchess* county, the jury assessed the damages to one hundred and forty-seven dollars.

Bloom, for the defendant, now moved to set aside the inquisition, for irregularity. It appeared, from the affidavits *which were read, that the execution of the writ of inquiry was commenced before the sheriff and jury, at six o'clock on *Saturday* evening; that the hearing of the allegations and proofs of the parties, and of the defendant's counsel, detained the jury until half past eleven o'clock of *Saturday* evening, when the defendant's counsel proposed an adjournment until after *Sunday*, but the plaintiff's counsel declined an adjournment, not considering the objection to giving a verdict on *Sunday* morning, sufficient; that the jury retired to consider of their verdict about one o'clock, A. M., of *Sunday*, and returned their verdict about four o'clock, A. M., of that day. Before the jury were summoned, the plaintiff's attorney requested the sheriff not to summon two men, who were freeholders, but against whom there was some objection as to their sitting in this cause, and the sheriff omitted to summon them; and it appeared that the defendant had consented to their being omitted by the sheriff. *T. B.*, another freeholder, and inhabitant of *Poughkeepsie*, who was summoned by the sheriff, appeared, and the plaintiff's attorney called the sheriff aside, and stated an objection to *T. B.* as a juror, and the sheriff discharged him, and put another juror on the panel. It did not appear that the defendant knew of the objection made to *T. B.* Some of the jurors stated that they understood that the defendant's counsel consented to waive any objection to proceeding with the inquiry on *Sunday* morning, otherwise they should have refused to proceed.

Bloom contended, that the inquisition ought to be set aside, on two grounds: 1. Because it was partly executed and taken on *Sunday* morning. 2. Because the plaintiff's attorney improperly interfered in the selection of the jurors.

In support of the first point, he cited 2 *N. R. L.* 195. *Jacob's Law Dict.* 140. *ad voc. Sunday.* 2 *Inst.* 264. 1 *Ld. Raym.* 706. 8 *East*, 547. 1 *Str.* 387. 8 *Johns. Rep.* 290. To the second point, *Trials per Pais*, 169. 9 *Johns. Rep.* 260 1 *Coxe's New-Jersey Rep.* 6. 169.

P. Ruggles, contra.

**Per Curiam*. The inquisition ought to be set aside. The writ was executed on *Sunday*, within the meaning of the statute. There was no necessity for taking the inquisition on *Sunday*, as the cause might have been adjourned over until *Monday*. It is not like the case of a trial at a circuit, where a verdict is sometimes taken on *Sunday* morning, because the jury must, otherwise, be kept together during *Sunday*. (a)

On the second ground, also, the inquisition ought to be set aside. Though the plaintiff's attorney may have acted with good intentions, and from no improper motive, yet if there is any legal or valid objection to a juror, it ought to be openly and publicly stated, and the sheriff may then set aside the juror against whom the objection is made, and summon another; or, if he should refuse to do so, it would be ground for an application to set aside the inquisition. There must be no interference with the jury or the sheriff.

Motion granted.

(a) Vide *Hoghtaling v. Osborn*, ante, p. 119. †

† *Story v. Elliott*, 9 Cow. Rep. 21.

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v.
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L. MERSEREAU against NORTON.

IN ERROR, on *certiorari* to a justice's Court.

The action was trespass, for taking and selling a yoke of oxen, brought by *Norton* against *Mersereau*. It appeared that the oxen were owned by the plaintiff below, and one *Amasa Norton*; that an attachment under the absconding *debtor act was issued against *Norton*, and the oxen in question were taken by the sheriff out of the possession of the plaintiff below, the defendant below being in company with the plaintiff, and ordering him to take them. The plaintiff below forbade the taking, but said nothing about claiming them. The oxen were afterwards sold by the trustees, who were duly appointed. The plaintiff below forbade the sale. The defendant, being present, directed the sheriff to proceed and sell, and the oxen were purchased by *Peter Mersereau*. The jury gave a verdict for the plaintiff, for 25 dollars.

Per Curiam. The defendant in the Court below pleaded not guilty, and stated that he should justify under the statute

tenant, who cannot, therefore, maintain trespass or trover against him, the tenancy in common not being severed or destroyed by the sale. (a)

Under an attachment issued in pursuance of the act against absconding and absent debtors, [* 180]

the sheriff may take and sell property of which the absconding debtor is a tenant in common with another, though it be in the possession of his co-tenant. But the sheriff can sell only the undivided moiety or interest of the debtor, and the purchaser, at such sale, becomes a tenant in common with the other co-

(a) Vide *Matter of Smith*, 16 Johns. Rep. 102.

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for giving relief against absent and absconding debtors. Why the defendant below interfered in any manner to direct the sheriff who had the attachment, does not appear. It is most likely that he was a creditor of *Amasa Norton*; but unless the sheriff was a trespasser, the defendant below could not be deemed so. He must be justified equally with the sheriff, under the attachment. There does not seem to be any complaint that the proceedings under the attachment were not regular; and the only question that appears to be raised on the return is, whether a sheriff, under an attachment like this, has a right to take and sell property of which the absconding debtor was only a tenant in common, when that property is found in the possession of the other co-tenant. Of this there can be no doubt. There is no other way to get at the interest of the one against whom the attachment issues. It is observable, in this case, that although, upon the trial, it appeared that the plaintiff below and the absconding debtor were tenants in common of the oxen, yet neither when they were first taken, nor when they were sold, did the plaintiff allege this, or that he had any claim to the property. Had a claim of property been interposed, the sheriff must have summoned a jury to try the right, and the sale would have been only of the interest of the absconding debtor, as in case of a sale under an execution of the property of joint partners. The sheriff, in such cases, seizes all, and not a moiety of the goods sufficient to cover the debt, and sells a moiety thereof undivided, *and the vendee becomes tenant in common with the other partner. (*Salk.* 292. 1 *East*, 367.) Although the sheriff sold the oxen as the sole property of *Norton*, yet no more than his interest passed, and the plaintiff below became tenant in common with the purchaser. The sheriff who took the oxen, and all who aided him, and the purchaser, must certainly have all the rights and interest of *Norton*, the absconding debtor; and one tenant in common of a chattel cannot maintain trover or trespass against his co-tenant. This doctrine is expressly laid down by *Littleton*, (§ 323.) and sanctioned by Lord *Coke*, who says, if one tenant in common take all the chattels personal, the other has no remedy by action, but he may take them again: this has been so held by this Court. (2 *Johns. Rep.* 468.) The sale here was not such a destruction of the property as to destroy the tenancy in common, as will be seen by the distinctions taken upon the trial, in *Wilson and Gibbs v. Reed*. (3 *Johns. Rep.* 176.) The judgment must be reversed. (a)

Judgment reversed.

(a) Vide *Moody v. Payne*, 2 *Johns. Ch. Rep.* 548. †

† *Sheldon v. Skinner*, 4 *Wendell's Rep.* 525. *Dunham v. Murdock*, 2 *Ibid.* 553.

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HASBROUCK

v.

TAPPEN.

The rule on the sheriff to bring in the body of the defendant cannot be served until 20 days, after the term in which the writ is returned, have expired; and it seems that the rule ought not to be enter

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ed before the expiration of that time

COONS *against* M'MANUS.

RICE moved for an attachment against the sheriff for not bringing in the body of the defendant in this cause. The rule on the sheriff for that purpose was served on him the 29th of October, before the expiration of twenty days after the term. The defendant treated the rule as a nullity.

Marcy, for the defendant, contended, that the plaintiff had no right to enter the rule until the twenty days after term had expired.

*SPENCER, J. Though you may enter the rule before the expiration of the twenty days after the term, yet it cannot be served until that time has expired.

VAN NESS, J. I think the rule ought not to be entered until after the twenty days have expired, for there is no default until that time. The plaintiff cannot take an assignment of the bail bond until after the expiration of twenty days after term, which is the time allowed for putting in special bail; and, by analogy, the rule for bringing in the body of the defendant ought not to be entered before the expiration of the twenty days. It clearly could not be served on the sheriff before the end of that time

Per Curiam. The motion must be denied.

HASBROUCK *against* TAPPEN.

THIS cause was tried at the late *Ulster* circuit. At the trial, the defendant's counsel took exceptions to the opinion of the judge in his charge to the jury. By agreement between the counsel of both parties, the bill of exceptions was to be prepared after the circuit, and sealed by the judge, at the next term, when the same should be argued. The bill was accordingly prepared and signed, and sealed by the judge, but he refused to grant an order to stay proceedings in the cause; and the plaintiff's attorney proceeded to enter up and perfect his judgment; but no execution was issued thereon.

The rule of practice as to cases, as to the necessity for an order to stay proceedings, does not apply to bills of exceptions, since the statute requires the Court to give judgment thereon; but the order to stay proceedings may be granted of course. (u)

Champlin, for the defendant, now moved, on affidavit, for an order to stay proceedings, and for a rule to vacate the judgment

(e) A bill of exceptions does not prevent a rule nisi for judgment. *Moran v. Dances*, 6 Com. Rep. 22.

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COOK.

and other proceedings since the *postea*, and that the cause be argued on the bill of exceptions.

C. Ruggles, contra.

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**Per Curiam.* The rule of practice as to cases made for argument does not apply to bills of exceptions, for the statute requires the judgment of this Court on the bill of exceptions, before the cause can be carried to the Court for the Correction of Errors. There is no need of an order to stay proceedings; or it may be granted, of course. This may, perhaps, lead to abuse; but if bills of exceptions are tendered on frivolous grounds, we shall be obliged to apply to them the rule of practice in the case of frivolous demurrers, by giving them a preference on the calendar, or take some other method to prevent delay or abuse.

Motion granted.

In the Matter of E. Cook, an Insolvent Debtor.

Affidavit of
petitioning cred-
itor of an insol-
vent debtor.

ON a question, referred to the Court by one of the judges of the Court of Common Pleas of *Madison* county, as to the sufficiency of the following affidavit of a creditor of an insolvent debtor, to wit, "*Madison* county, ss. *J. S.*, of, &c., maketh oath, that the sum of 223 dollars, subscribed to the petition of *E. C.*, an insolvent debtor, hereunto annexed, is justly due to this deponent from the said insolvent, on a note of hand given by the said *E. C.* to this deponent, on a settlement of accounts between us;" *The Court* said, that the affidavit was insufficient. That the nature of the account on which the settlement took place, or the general ground of indebtedness, ought to be set forth in the affidavit. (a)

(a) *Sidell v. M'Crea*, 1 *Wendell's Rep.* 156. *Taylor v. Williams*, 20 *Johns Rep.* 22.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK.

IN MAY TERM, 1818, IN THE FORTY-SECOND YEAR OF OUR
INDEPENDENCE.

JOHNSON *against* HITCHCOCK.

IN ERROR, on *certiorari* to a justice's Court.

This was an action on the case brought by the defendant in error against the plaintiff in error, for a disturbance of his right of ferry, and his use and enjoyment thereof, and hindering persons from crossing at the same. It appeared that the defendant below had endeavored to divert travellers from the ferry of the plaintiff, representing it not to be as good as another near it, and had, on many occasions, succeeded. No evidence was offered on the part of the defendant, and the jury found a verdict for the plaintiff below, for 22 dollars and 16 cents, on which judgment was rendered.

No action lies for representing the plaintiff's ferry not to be as good as another rival ferry, and inducing travellers to cross at the other, and not at the plaintiff's ferry.

Per Curiam. It is clear, from the evidence, that the defendant below has, on many occasions, interfered, and prevented persons from crossing at the plaintiff's ferry; and if there is a good cause of action, the testimony shows an injury, probably, to the amount of the recovery. But there is *no principle on which this action can be sustained. The evidence, imperfectly as it is stated, is sufficient to warrant the conclusion, that these are rival ferries near each other, and that the defendant below was unfriendly to the plaintiff's ferry, and endeavored to turn the custom to the other. This action does not appear to be founded on any slander of title, even admitting that an action of that kind might be sustained in a justice's Court. Both ferries, from any thing that appears to the contrary, have equal rights and equal claims to be upheld and supported, and it cannot fur-

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nish a cause of action that travellers have been persuaded to cross the one rather than the other. If an action would lie in this case, it would in all cases of rival business, where any means are used to draw custom; and if this were once admitted, it would be difficult to know where to stop. The judgment must be reversed.

Judgment reversed.

WOODWORTH *against* KISSAM.

Where a creditor, by fraud or deception, obtains the goods of his debtor, the property is not changed, and he cannot apply them to the satisfaction of his debt, but the debtor may maintain *trover* against him. (a)

What circumstances are sufficient to make out fraud and deception, in such case, is a question to be left to the jury.

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THIS was an action of *trover* for a gold watch. The cause was tried before Mr. J. Platt, at the *Columbia* circuit, in *September*, 1817.

A witness on the part of the plaintiff proved, that after the plaintiff and defendant had been in private together, he came in, and found the defendant with the plaintiff's watch in his possession; that the plaintiff demanded the watch and money, notes and accounts, of the defendant, who refused to give them up; that the plaintiff charged the defendant with having snatched them from the table, and that he had deceived him; that the defendant replied, that the plaintiff owed him, and that he meant to have his pay. The plaintiff, soon after, stated to the defendant, in the presence of the witness, that the defendant had uniformly represented himself as the agent of the plaintiff's creditors in the city *of *New-York*; that he had assured him, repeatedly, that he was authorized to receive the three shillings in the pound, which had been offered, and discharge him from his debts in *New-York*; that the defendant well knew, that such discharge, on the delivery of the property, was the only condition upon which he had ever consented to treat with him, and had gotten his property unfairly, and the plaintiff again demanded it of him. The defendant did not deny these allegations, but replied, that he would endorse the amount of the property on the notes which he held against the plaintiff, and would not restore it. It appeared that the plaintiff was indebted to the defendant and his partner in the sum of 800 dollars, and that the defendant had endorsed upon the notes in his possession, given by the plaintiff to the defendant and his partner, the value of the property, which amounted to nearly the sum due on the face of the notes.

On this evidence the judge nonsuited the plaintiff, who now moved to set aside the nonsuit; and the case was submitted to the Court without argument.

(a) Vide *Allen v. Crofoot*, 5 *Wendell's Rep.* 506. *Chayman v. Lathrop*, 6 *Conn. Rep.* 110. *Lockwood v. Bull*, 1 *Cowen*, 322. *Reynolds v. Shauler*, 5 *Id.* 325.

Per Curiam. This is a motion to set aside a nonsuit, ordered upon the trial of this cause. This action was trover for a gold watch. Whether there was sufficient evidence of a conversion, should have been submitted to the jury. The evidence was circumstantial only; but it was pretty strong to show that the defendant had, by undue means, got possession of the watch in question. That the watch was the property of the plaintiff a short time before it was found in the defendant's possession, is not denied. What passed between the parties when the defendant received the watch, was in private; but in the subsequent conversation between them, the plaintiff charged the defendant with having violated his engagement in relation to it, and that he had deceived him, and got the possession unfairly. The defendant did not deny his statement, but offered to endorse the value of the watch upon the notes which he held against the plaintiff, and did, afterwards, make the endorsements. If there was, however, any fraud or deception practised on the plaintiff, no change or transfer of property took place. No man can avail himself of his own misconduct, as the foundation of a claim set up by him. The principles which governed the decision of the Court in *Murray v. Burling*, (10 Johns. Rep. 172.) will apply here, if the circumstances shown upon the trial were sufficient to make out the misconduct of the defendant; and whether they were so or not, should have been submitted to the jury. The nonsuit must, accordingly, be set aside, and a new trial awarded

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Motion granted.

COMLY against Lockwood and others.

THIS was an action of trespass, for breaking and entering the store of the plaintiff, and for taking and carrying away his goods, brought against the defendant, *Lockwood*, sheriff of the county of *Orange*, and several other persons.

Lockwood pleaded separately, 1. Not guilty. 2. That the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he said, that the said supposed trespasses, whereof the said plaintiff above thereof complained against him, were done and committed, if by the said defendant, by the authority of an act of the legislature of the state of *New-York*, entitled "an act for relief against absconding and absent

Where, in an action of trespass, the defendant, under the act for the more easy pleading in certain suits, (sess. 24. c. 47. s. 2. 1 R. L. 155.) pleads that the supposed trespass was done by authority of a statute of this state, without expressing any other matter or circumstance

contained in such statute, the plaintiff must reply *de injuria sua propria*, concluding to the country, and a special replication, concluding with an averment, is bad. (a)

(a) Vide *Allen v. Crofoot*, 7 Cowen, 46.

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debtors," passed the 21st of *March*, in the year 1801; and thus he is ready to verify, &c.

The plaintiff replied that *Haviland*, one of the defendants, on or before the 13th day of *July*, made oath that one *Field* was justly indebted to him, in the sum of one hundred dollars and upwards, and had departed the state, or was concealed, with intent to defraud his creditors, and offered proof of his departure or concealment to *Nathan H. White*, Esq., first judge of the Court of Common Pleas of the county of *Orange*, who thereupon issued his warrant to the sheriff of the county of *Orange*, commanding him to attach the estate of *Field*; that the defendant thereupon seized the goods and chattels mentioned in the declaration, to which the *plaintiff put in a claim, whereupon the defendant summoned a jury to try the property thereof, who found the property of the same to be in the plaintiff, and the defendant then relinquished the goods to the plaintiff; that on the 22d of *July*, *Nathan H. White* issued another warrant, directed and delivered to the defendant, the former warrant still remaining in force, and not returned, and on no other proof than had been before made; that the goods which had been before restored to the plaintiff, were again seized by the defendant, which is the same trespass and taking as are complained of and intended by the plaintiff in his declaration; and that the defendant, well knowing the premises, took and carried away the goods of the plaintiff by the said second warrant, and not under authority of the "act for relief against absent and absconding debtors;" and concluded with an averment.

The defendant rejoined; that the plaintiff ought not to have or maintain his action, because he saith, that the said supposed trespasses were done and committed by the defendant, by the authority of the act entitled, &c., and concluded to the country. To this rejoinder the plaintiff demurred, assigning a number of special causes of demurrer, which, as they are not noticed in the opinion of the Court, it is unnecessary to state, and the defendant joined in demurrer.

P. Ruggles, in support of the demurrer. The plea is bad; and if so, it is unnecessary for the plaintiff to go further. The act for more easy pleading in certain suits, (1 N. R. L. 155. sess. 24. ch. 47. s. 2.) (a) declares that persons sued for acts done by authority of any statute, may plead not guilty, or otherwise make avowry, cognizance, or justification, &c., alleging therein that such thing, of which the plaintiff complains, was done by the authority of such statute, without expressing any other matter or circumstance contained in such statute, &c. In this plea, nothing is stated, except that the act was done by authority of the statute. There is no fact which can be traversed, or on which issue can be taken. If the defendant makes avowry, or cognizance, he must use the proper form of such a plea. So,

if he pleads *a justification, it must be in such a way as to be traversable.

But if this objection to the plea be not well founded, then we say that the rejoinder is defective, for it ought to have concluded with a verification, and not to the country. Wherever any new matter is introduced, on either side, the pleading must conclude with a verification, so that the other party may have an opportunity of answering it. (1 *Chitty's Pl.* 537. *Service v. Heermance*, 1 *Johns. Rep.* 91. 1 *Chitty's Pl.* 578. *Willes's Rep.* 100. *Comyn's Dig. Plead.* (F. 18.) (F. 24.)

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Betts, contra. The plea contains all that the statute requires: if the legislature have thought proper to authorize such a plea, it is sufficient. In *Tower v. Cameron*, (6 *East*, 413—416.) Lord *Ellenborough* says, it is enough that it is a plea given by the statute, and that every word required by the statute is found in the plea. All the rest is matter of evidence. In *Lalagh v. Cantine*, (13 *Johns. Rep.* 272.) this Court held the plea supported by the statute, though contrary to the general rules of pleading.

If the plea is good, the rejoinder is so also. It cannot depart from it, and may adopt the very words of the plea, (3 *B'l. Com.* 410 1 *Chitty, Pl.* 627. 2 *Chitty*, 671. n. 1 *Saund.* 103. n. 3.) and conclude to the country. Matters allowed by statute to be given in evidence need not be put on the record. (*Henriquez v. Dutch W. I. Co.* 2 *Ld. Raym.* 1535.) If the several matters alleged in the replication are denied, they need not be severally and distinctly put in issue, but the rejoinder may conclude to the country generally. (1 *Chitty, Pl.* 629. *Com. Dig. Plead.* (H.) The rejoinder always concludes to the country, unless it introduces new matter, which the plaintiff might answer. (1 *Chitty, Pl.* 628.) Where the whole matter in dispute is brought to a point, the pleading may conclude to the country. (*Snyder v. Croy*, 2 *Johns. Rep.* 428. *Patcher v. Sprague*, *id.* 462.)

But the replication is bad in form and substance. The defendant is, therefore, entitled to judgment. (*Gelston v. Burr*, 11 *Johns. Rep.* 482.)

*[THOMPSON, Ch. J. When you go back to the plea of your adversary, to take advantage of its being bad, you can object only such defects as are grounds of general demurrer.]

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Where the statute authorizes a particular mode of pleading, different from the common law, there the mode pointed out by the statute must be pursued. (*Caines v. Brisban*, in *Error*, 18 *Johns. Rep.* 9—23. *Bouton v. Nelson*, 3 *Johns. Rep.* 474. *Mimro v. Allaire*, 2 *Caines*, 322. *Alsop v. Caines*, 10 *Johns. Rep.* 396. 2 *Burr.* 803.) Again; the replication does not confess and avoid the plea. (*Comyn's Dig. Plead.* (G. 22.) 1 *Chitty*, 564. 600.) If the replication escapes the bar of the plea, it is

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by showing that the action is for other and different trespasses than those justified by the plea; and then there should have been a new assignment; but this replication has none of the requisite qualities of a new assignment. (1 *Saund.* 299. c. n. 6. 1 *Chitty*, Pl. 610—613. 2 *Chitty*, Pl. 653—658.) It is not necessary to plead over to a new assignment, even if this was one, any matter of justification necessarily covered by the plea. Again; the replication does not offer issue on any one material point. (*Comyn's Dig. Plead.* (R. 18.) 1 *Chitty*, 631.) There are six distinct facts averred in the replication, neither of which, if issue had been taken thereon, would determine the cause. It ought to have concluded to the country. (5 *Johns. Rep.* 428. 467. 1 *Johns. Rep.* 516. 5 *Johns. Rep.* 112. 6 *Johns. Rep.* 33. 10 *Johns. Rep.* 51. 13 *Johns. Rep.* 172. *Ld. Raym.* 700. *Willcs*, 100. n. a. 8 Co. 66. 7 *Term Rep.* 892. 8 *East*, 313. *Doug.* 96. 428. 1 *Burr.* 316.)

Again; we contend, that whether the proceedings under the warrant were regular or not, the sheriff, and all persons acting under color of his authority, are protected. (*Beach v. Furman*, 9 *Johns. Rep.* 229. *Warner v. Shed*, 10 *Johns. Rep.* 138. *Selfridge v. Lithgow*, 2 *Mass. Rep.* 374. *Scott v. Shaw*, 13 *Johns. Rep.* 378. 1 *Madd. Ch.* 12. *Cole v. Stafford*, 1 *Caines's Rep.* 249. 1 *Johns. Rep.* 300. *Hester v. Fortner*, 2 *Binney*, 40. *Jackson v. Delancey*, 13 *Johns. Rep.* 550. *Jackson v. Bartlett*, 8 *Johns. Rep.* 361.)

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**Ruggles*, in reply, said, that since the statute of *Eliz.*, from which our statute was copied, a precedent of such a plea was not, he believed, to be found in the *English* books. The material point in the replication is, that the property belonged to the plaintiff. That is the gist and substance of the replication, and is the point on which the plaintiff relies, and the defendant might have taken issue on it. This is not a case on which the rejoinder may help and support the plea. (1 *Saund.* 299. *Doct. Placit.* 431. *Lawes Pl.* 240. *Cowp.* 26. *Str.* 993 2 *Saund.* 5. n. 3. 3 *Johns. Cas.* 107. 11 *Johns. Rep.* 175 1 *East*, 64. 7 *Term*, 629. n. 2 *East*, 244.)

THOMPSON, Ch. J., delivered the opinion of the Court.

This case comes before the Court on a demurrer to the rejoinder. The action was trespass *de bonis asportatis*. The defendant pleaded, first, the general issue; and, secondly, that the plaintiff ought not to have and maintain his action, because the said supposed trespasses were done and committed by the authority of an act of the legislature of the state of *New-York*, entitled "an act for relief against absconding and absent debtors," passed the 21st of *March*, 1801, with a verification, &c. The plaintiff replied, setting forth, specially, certain proceedings commenced against *Benjamin Field*, as an absconding debtor, upon which an attachment issued, and the goods were
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question were seized under it, in the store of the plaintiff; that a claim of property was interposed, and a jury called to try the right, and by their inquisition, found the goods in question to be the property of the plaintiff; upon which the defendant relinquished and gave up the goods to the plaintiff; that afterwards another attachment was issued upon the same proof, and without any new affidavits, and the same goods again taken; and that the last taking was the trespass complained of, and denying that the goods were taken by the defendant, under the authority of the act set forth in his plea, and concluding with a verification. The defendant rejoined in nearly the same words of his plea, without answering any of the special matter set up in the replication, and concluded to the country. To this replication there is a special demurrer.

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*The question presented by the demurrer must turn upon the construction to be given to the act for the more easy pleading in certain suits. (1 N. R. L. 155.) (a) By this act it is declared, that if any action shall be brought against any person for any thing done by authority of any statute of this state, the defendant may make justification for the thing done, alleging therein, that the thing whereof the plaintiff complains, was done by authority of such statute, without expressing any other matter, or circumstance, contained in such statute; to which the plaintiff shall be admitted to reply, that the defendant did the act, or *trespass*, supposed in his declaration, of his own wrong, without any such cause alleged by the defendant, whereupon issue shall be joined to be tried by a jury, and upon the trial, the whole matter may be given in evidence by both parties. The object of this statute was, (as it purports from the title to be,) to give a more easy mode of pleading, in certain cases, than would otherwise be admissible, according to the general rules of pleading. If the plaintiff can, by his replication, draw the defendant into a special rejoinder, he will lose all the benefit, intended by the statute, in giving the general pleadings therein contained. The plea pursues the very words of the statute; and as it is given by the statute, no more can be required. The facts set forth in the replication are matters of evidence; and the plaintiff must avail himself of them upon the trial. The statute, after giving this general plea, declares, that upon the trial of such issue, the whole matter may be given in evidence. If the plea is good, it follows, as matter of course, that the replication is bad: it should have pursued the directions of the statute; and as this is the first fault in the pleadings, the defendant is entitled to judgment.

Judgment for the defendant.

(a) 2 R. S. 353.

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May, 1818.

HALL

v.
BROWN.

Where the possession of a farm, and some other matters in controversy between the parties, were submitted to arbitration, and a sum of money and possession of the farm were awarded to the defendant, who brought an action of ejectment to recover the possession; and it was then agreed that the plaintiff should give up possession to the defendant, and that the defendant should relinquish his claim under the award, and pay the plaintiff 150 dollars, it was held, in an action on a note given to secure part of that sum, that the note was given on a good consideration, and was valid, the subsequent settlement not being affected by the previous award, and the parties having authority to vary the rights acquired under it.

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*HALL against BROWN.

THIS was an action of *assumpsit* on a promissory note made by the defendant, payable to the plaintiff, dated the 15th of January, 1815. The cause was tried before Mr. J. Yates, at the *Washington* circuit, in June, 1817.

At the trial, the plaintiff proved the note in question. The defendant gave in evidence, that the possession of a certain farm, occupied by the plaintiff, and some other matters, were in controversy between the parties, which were submitted to arbitrators, who awarded that the plaintiff should pay the defendant 137 dollars, and deliver up the possession to him. The plaintiff refused to give up the possession, unless compensated for his improvements, and the defendant brought an action of ejectment. The parties afterwards came to a settlement, and it was agreed that the plaintiff should resign the possession of the farm to the defendant, and let him have a barrel of pork, in consideration of which, the defendant was to relinquish his claim under the award, and pay the plaintiff 150 dollars. The note in question was given for part of that sum, and the plaintiff delivered the barrel of pork to the defendant. A verdict was found for the plaintiff for the amount of the note, subject to the opinion of the Court, on a case containing the above facts.

Per Curiam. The only ground of defence relied upon in this case, is the want of consideration for the note on which the suit is founded; and there is no color for this objection. The note was given upon a fair settlement of a suit pending between the parties, respecting a farm in the possession of the plaintiff, on which settlement, and giving the note now in question, the plaintiff surrendered up the possession of the farm to the defendant.

There having been a previous arbitration between the parties, in relation to some part of the dispute between them, cannot impeach such settlement. They had a right to modify and alter what had previously taken place; and *the giving up the claim of the defendant under the award, was one part of the consideration for the plaintiff's surrendering the possession of the farm to the defendant. The plaintiff must, accordingly, have judgment upon the verdict.

Judgment for the plaintiff.

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May, 1818.DUDLEY
v.
STAPLES.WILLIAMS *against* SHERMAN.IN ERROR, on *certiorari* to a justice's Court.

It appeared that one of the questions raised on the return to the *certiorari*, related to the credibility, as well as admissibility, of a witness sworn on the part of the defendant below, the plaintiff in error; but it is unnecessary to state the facts in relation to this point. The justice, in rendering judgment for the plaintiff below, included, in the costs, fees for swearing both the defendant's and plaintiff's witnesses.

Per Curiam. The credibility of the witness was a question for the justice; and we should not set aside the judgment on that ground, especially as it is very questionable whether he was properly admitted. But in the costs, the justice has allowed the costs of swearing the defendant's witnesses. This was incorrect. The judgment must, therefore, be affirmed as to the damages, and reversed as to the costs, and no costs will be recoverable on either side. (8 *Johns. Rep.* 111. 13 *Johns. Rep.* 350. 460.)

Judgment affirmed.

(a) *Timmerman v. Morrison*, 14 *Johns. Rep.* 369. *Dennison v. Collins*, 1 *Cowen*, 111.

Where a justice, in giving judgment for a plaintiff in a suit before him, includes costs incurred on the part of the defendant, the judgment will be reversed as to the costs. (a)

Where, on a *certiorari* to a justice's Court, the judgment is affirmed in part, and reversed in part, costs in error will not be allowed on either side.

*DUDLEY *against* STAPLES.

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IN ERROR, on *certiorari* to a justice's Court.

The proceedings in the Court below were commenced by the defendant in error against the plaintiff in error, by attachment. *Dudley*, the defendant below, at the time when the attachment was issued, was an inhabitant of the county of *Schoharie*, and the justice, who issued the process, was a magistrate in *Schenectady* county, and issued the attachment against the property, while it was passing through that county. The justice had previously issued a warrant against the defendant, which could not be served; and it appeared that the service of a copy of the attachment was made by leaving it at the store of the plaintiff below, where the defendant had been shortly before. On the trial, the defendant appeared, and objected to the proceedings as improperly and irregularly commenced; but the motion was

Where a person was passing through a county other than that in which he resided, and a justice of that county issued an attachment against him under the 23d section of the act for the recovery of debts to the value of 25 dollars, (1 *N. R. L.* 398.) the proof on which it was issued being that a warrant had been issued by the justice against the de-

fendant, the service of which he had avoided, and a copy of the attachment was served by leaving it at a store at which the defendant had been a short time before; it was held that the provisions of the act did not apply to a case of this kind, and that the proof on which the attachment was issued, and the service of the copy, were insufficient.

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overruled; and the cause was tried, and judgment rendered for the plaintiff below.

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Per Curiam. The principal question, in this case, is, whether the justice had any authority to issue an attachment. The 23d section of the act (1 N. R. L. 398) (a) under which the process issued, authorizes any justice of the peace, in any county, on application, and satisfactory proof, by at least one disinterested witness, that any person against whom the applicant may have a demand not exceeding twenty-five dollars, hath departed, or is about to depart, from such county, or is concealed within the same, with intent to defraud any of his creditors, or to avoid being personally served with any process, &c., to issue an attachment, &c. The magistrate lived in the county of *Schenectady*, and the person against whom the attachment issued was a resident in the county of *Schoharie*. The justice returns, that the proof made before him, and upon which the attachment issued, was, that an attempt had been made to serve a warrant *on the defendant below, and that he ran away to avoid such service, and that he was then absconding for the purpose of avoiding the personal service of such process. The obvious intention of the act was, to give the process of attachment against the property of a person who had absconded, or departed from his usual place of residence, and not where he might be occasionally travelling through a county; besides, the mere fact of not being able to serve a single warrant upon a traveller, who, for many reasons, might wish to avoid the arrest, without being chargeable with intent to defraud his creditors, is not that kind of evidence of concealment contemplated by the act; and the provisions of the 24th section very strongly corroborate the construction, that an attachment cannot be issued in a case like the present. It is made the duty of the constable to leave a copy of the attachment at the dwelling-house, or other last place of abode of the defendant, and the provision is entirely evaded in this case; for it is absurd to consider the store of the plaintiff, where the defendant was for a few minutes, his dwelling-house, or last place of abode. The judgment must, therefore, be reversed.

Judgment reversed.

(a) 2 R. S. 232.

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NEW-YORK,
May, 1818SELICK and SELICK *against* ADDAMS.

SELICK

v.

ADDAMS

Under a general submission of all controversies and demands, the arbitrators may award as to real

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property; and where an award settles the boundary of land, it is sufficient to enable the party to whom the land has been awarded to bring an action of ejectment, and is a justification in an action of trespass brought by the other party. (a)

Where sworn copies of the award are delivered to the parties by the arbitrators, and received without objection, this will be deemed a waiver of their right to receive the original award.

THIS was an action of trespass, for cutting timber on certain and in the town of *Phillipstown*, in the county of *Putnam*. The cause was tried at the *Putnam* circuit, in *September*, 1817.

The plaintiffs were two of the heirs at law of their father, *Gould John Sellick*, who died about three years before the trial, leaving eight other children, from two of whom the plaintiffs had deeds for their undivided part of their father's estate. The plaintiffs proved that they were in possession of the premises, and that the defendant had cut timber upon them. The defendant gave in evidence a bond executed by *Gould John Sellick*, the father of the plaintiffs, bearing date the 14th of *June*, 1810, conditioned to perform the award of *Samuel Owens*, *Abraham Smith*, and *Robert Johnson*, arbitrators appointed by and on the behalf of the said *Gould John Sellick*, and *John Addams*, the defendant, "to arbitrate, award, order, judge, and determine, of and concerning all, and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands, whatsoever, at any time hereafter had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending, by or between the said parties, so as the award of the said arbitrators, or any two of them, be made and set down in writing, under their, or any two of their hands and seals, ready to be delivered to the said parties in difference, on or before the 18th of *July* next ensuing." Under this submission the arbitrators fixed the boundary between the land of *G. J. Sellick* and the defendant, by which the premises where the trespass was alleged to have been committed came within the boundary line of, and were awarded to, the defendant.

Samuel Owens, one of the arbitrators, testified, that but one award was made and signed by them, and that they agreed among themselves not to deliver it to either party, but that the witness should keep it, and deliver sworn copies; which, accordingly, were made and delivered to the parties. The witness, although he did not recollect, presumed that they were delivered before the expiration of the time limited by the bond, and did not recollect hearing any disapprobation expressed by *Sellick*, on account of not receiving an original award, nor any request to have one. It appeared, from the respective title deeds of the parties, that there was some confusion in their boundary lines, but it fully appeared that the plaintiffs had the legal title to the *locus in quo*.

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(a) Vide *Byers v. Van Deusen*, 5 *Wendell's Rep.* 268. *Gould v. James*, 6 *Conn. Rep.* 383. *Jackson v. Gager*, 5 *Conn. Rep.* 383. *Shepherd v. Ryers*, *infra*, 497. *Cox v. Jagger*, 2 *Conn.* 638.

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ADDAMS.

A verdict was taken for the plaintiffs, subject to the opinion of the Court, and the case was submitted to the Court without argument.

Per Curiam. This is an action of trespass *quare clavi um fregit*; and the plaintiff's right to recover is fully established, unless the alleged trespass was justified by the award which was set up on the part of the defendant. By the award, the *locus in quo* is considered as belonging to the defendant. Two objections have been made to this award: 1st. That it is not warranted by the submission; 2d. That it never was delivered to the parties.

The submission does not specify any particular matters submitted, nor does it mention any existing differences relative to lands; but is a general submission of all actions, and causes of actions, and of all quarrels, controversies, trespasses, damages, and demands whatsoever. In the case of *Munro v. Allaire*, (2 *Caines's Rep.* 327.) it is said by this Court, that questions concerning real property may be submitted without being specially named; that a submission of *all demands* includes questions concerning real as well as personal property; that the law does not require a specific submission as to one kind of property more than as to another; and the case of *Marks v. Marriot*, (1 *Lord Raym.* 114.) is referred to and relied on as supporting this doctrine.

2. A delivery of the award must be deemed to have been dispensed with. It was made without the time limited by the submission, and was retained by one of the arbitrators, and sworn copies were delivered to the parties respectively. This would not have been sufficient had an original been claimed; but the copy, according to the best recollection and belief of the witness, was delivered to each party before the expiration of the time limited in the submission. An acceptance of a sworn copy, without objection, must be deemed a waiver of any claim to have the original. This award would, undoubtedly, have been sufficient to enable the defendant to have recovered in an action of ejectment, *according to the doctrine of this Court. (*Jackson, ex dem. Stanton, v. De Long*, 9 *Johns. Rep.* 43.) (a) It must, therefore, be considered as giving to the defendant a right of entry, and a license to enter, and is, of course, sufficient to justify the entry, and cutting of the timber.

(a) In *Doe, d. Morris and others, v. Rosser*, (3 *East's Rep.* 15.) the Court say, that an award cannot have the effect of conveying the land, although they held that it concluded the defendant from disputing the lessor's title. In *Calhoun's lessee v. Dunn'g*, (4 *Dallas's Rep.* 122.) the Court say, "An award cannot give a right to land; but a report of referees will settle a dispute about land, either in an ejectment, or in an action of trespass." See, also, *Jackson, d. Nollie, v. Dysling*, (2 *Caines's Rep.* 198.) But an award making partition between tenants in common, without directing conveyances to be executed, was held void. (*J. hnson v Wilson, Willes's Rep.* 248.) And where a stack of hay was awarded to be delivered to the plaintiff, it was held that no property was transferred by the award, and, therefore, he could not maintain trover for it, but that his remedy was on the award. (*Hunter v. Rice*, 15 *East's Rep.* 100.)

The pleadings are not before us ; and we presume that they are sufficient to let in this defence, if at all admissible. The defendant is, accordingly, entitled to judgment.

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v.
TAPPEN.

Judgment for the defendant.

HASBROUCK against TAPPEN.

THIS was an action of covenant. The declaration stated an agreement made between the plaintiff and defendant, on the 25th of November, 1815, by which the defendant agreed, on the first day of January next thereafter, by a good and sufficient warranty deed, free of all encumbrances, to sell and convey to the plaintiff, his heirs, and assigns, a certain *lot of land in the town of Kingston, which was to be surveyed ; and the plaintiff agreed to pay to the defendant, on the delivery of the deed, 1,250 dollars, by his bond, payable, without interest, on the first day of May next, after the date of the agreement ; and in case of failure of the parties to the agreement, they thereby bound themselves, each unto the other, in the sum of 500 dollars, which they consented to fix and liquidate, as the amount of damages to be paid by the failing party, for his non-performance, to the other. The plaintiff averred that he had always been ready to pay the defendant in the manner mentioned in the agreement, and assigned for breach, that the defendant did not, on the first of January, or at any time since, by a good and sufficient warranty deed, free of all encumbrances, sell and convey, &c. The defendant pleaded *non est factum*, with notice of special matter to be given in evidence. The cause was tried before Mr. Ch. J. Thompson, at the Ulster circuit, in 1817.

The plaintiff, at the trial, having proved the agreement, the defendant produced as a witness, a surveyor, who testified that he was employed, in December, 1815, by the parties, to survey the land ; that on account of bad weather he did not make the survey at the appointed day, and that in the same month he had a conversation with the plaintiff, in which the witness told him that he had been informed by the defendant, that the survey must be done by the 1st of January ; to which the plaintiff replied, that it was immaterial as to the day, and that if the defendant performed his contract, he would take no advantage, on account of his not doing it on the precise day mentioned in

In an agreement for the sale and conveyance of land, the vendor covenanted to convey the land, which was to be

[* 201] surveyed, free of encumbrances, by the 1st of January. The land was not surveyed in time, and the vendee declared that he would take no advantage on account of the vendor's not conveying on the precise day mentioned in the agreement. The land was, some months afterwards, surveyed, but the vendee refused to accept a conveyance, because it was encumbered, which was the fact. It was held, that the vendee, by enlarging the time, did not waive his right to recover a sum which was fixed and liquidated by the agreement, as the amount of damages to be paid by the party failing in

performance, even admitting that his consent to extend the time amounted to an agreement ; for such subsequent agreement, by parol, was void by the statute of frauds, and could not alter, revoke, or modify the previous valid contract. (a)

(a) Vide *Dubois v. Del. & Hudson Canal Co.* 4 *Wendell's Rep.* 285. *Jenn. v. Schroepel*, 4 *Cow. Rep.* 661.

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the agreement. The land was not surveyed until *May, 1816*, when the survey was made in the presence of the parties, without any objection on the part of the plaintiff. The defendant, afterwards, offered to execute a deed; but the plaintiff declined accepting it, on the ground that the premises were encumbered, and at the trial produced the record of a mortgage, which had become forfeited, executed by the plaintiff, including these premises with other land, and conditioned for the payment of 2,672 dollars and 16 cents; and another mortgage on the premises, also forfeited, conditioned for the payment of 226 dollars.

The defendant's counsel insisted that the plaintiff ought not to recover the stipulated damages mentioned in the agreement, because the plaintiff's waiver of the time of performing the agreement, until after the 1st of *January*, amounted, in law, to a waiver of those damages; but the chief justice charged the jury, that the plaintiff was entitled to recover the damages stipulated for the non-performance of the agreement; and the jury, accordingly, found a verdict for the plaintiff, for 500 dollars damages. The defendant tendered a bill of exceptions to the opinion of the chief justice.

Champlin, for the defendant, contended, that the plaintiff, by agreeing to extend the time of performance, had waived the penalty, and could recover only the actual damages which he had sustained by the non-performance. He cited *Astley v. Welton*, 2 Bos. & Pull. 346. *Brown v. Goodman*, cited in *Littler v. Holland*, 3 Term Rep. 592. *n. Thresh v. Rake*, 1 Esp. N. P. Rep. 53. *Phillips v. Rose*, 8 Johns. Rep. 392. *Freeman v. Adams*, 9 Johns. Rep. 115.

C. Ruggles, contra, insisted that the 500 dollars were to be considered as stipulated damages. (*Dennis v. Cummins* 3 Johns. Cas. 297. and note.) In *Keating v. Price*, (1 Johns. Cas. 22.) the Court admitted evidence of a parol agreement to enlarge the time of performing a written contract. (*Fleming v. Gilbert*, 3 Johns. Rep. 528.) But in these cases, the contract was of that nature, that, if it had been originally by parol, it would have been valid. Here the parol agreement must be void, by the statute of frauds, and so could be no modification of the original contract.

THOMPSON, Ch. J., delivered the opinion of the Court.

This case comes before the Court on a bill of exceptions taken at the trial. It was an action of covenant, to recover five hundred dollars, as stipulated damages agreed on between the parties, to secure the performance of certain covenants contained in an agreement of the 25th of *November, 1815*. There was no question upon the trial, but that it was a case of stipulated damages. The agreement, with respect to that, is too explicit to admit of any doubt. The parties bound themselves to each

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other in the sum of five hundred dollars, which, in the language of the covenant, they consented to fix and liquidate as the amount of damages to be paid by the failing party, for his non-performance, to the other. The evidence, as appearing on the bill of exceptions, shows that the plaintiff was always ready, and did every thing on his part required by the agreement; and that the defendant did not, and could not, perform, on his part, by reason of certain encumbrances on the land which he had covenanted to convey to the plaintiff.

The only question upon the trial was, whether the plaintiff had not waived the stipulated damages, by the indulgence he had given to the defendant. By the covenant, it appears that the deed was to be given by the first day of *January* next after the date of the agreement. The evidence shows, that the defendant, finding some difficulty in having the necessary survey made in season, his surveyor had a conversation with the plaintiff on the subject, when the plaintiff said, that it was immaterial as to the day; that if the defendant performed his contract, he would take no advantage, on account of his not doing it on the precise day mentioned in the agreement. No advantage was taken; for the plaintiff was always willing to accept the deed, and perform, on his part. But the defendant was unable to comply with his covenant, and convey the land, free from encumbrances. He comes now, with a very ill grace, to set up this indulgence given him, to discharge himself from his covenant. It is a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned; so that if, by the covenant, any act was to have been done by the plaintiff, before the conveyance was to be made, the defendant's conduct would have dispensed with the performance. But no such act was required. We have no *oyer* of the covenant, but, according to the declaration, the covenants were independent; or, at all events, nothing is required to be done by the plaintiff, until the delivery of the deed. He has averred his readiness to perform on his part, and this is fully shown by the proof. Even admitting that an agreement to extend the time of performance would be a waiver of the stipulated damages, there was not, in fact, any such agreement. Nothing ever passed between the parties on the subject. All that the plaintiff ever said, as to the extension of the term, was, that if the defendant would perform his contract, he would take no advantage of its not being done on the precise day. This could not be called an agreement to extend the time: no day was fixed, to which the performance was postponed; and it would be a violent and unnatural construction of the plaintiff's conduct, to consider it as intended to waive his covenant, and enter into a new agreement, especially as such parol agreement would be void under the statute of frauds. If this is to be considered a new agreement, which in any manner affects the covenant, the plaintiff's whole remedy is gone. He can no more

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sustain an action for his real damages to be proved, than he can for the stipulated damages; and this was not pretended on the trial. An agreement, absolutely void, can never be considered as altering, revoking, or modifying, a valid contract. In all the cases referred to, where the term has been extended, the subject matter was such as might be embraced by a parol agreement, and the parties have been driven to the new contract for redress; but when the new contract is void in law, and the party without remedy if turned over to it, it would be extremely unjust. Nor was it contended, on the trial, that the plaintiff's remedy was on the new agreement. That forms no part of the objection to the recovery, as stated in the bill of exceptions. It is placed entirely on the ground, that an extension of the time is a waiver of the stipulated damages only. But the mere extension of the time of performance is not a waiver of any thing. This principle is settled by the case of *Evans v. Thompson*, (5 East, 193.) where it was held, that the time for making the award, being enlarged by agreement, did not dispense with the stipulation to make the submission a rule of Court. The Court said, the agreement to enlarge the time must be understood as by reference virtually incorporating in itself all the antecedent agreement between the parties, relative to that subject, as if the same had been formally set forth and repeated therein. In every point of view, therefore, in which this case can be viewed, the plaintiff is clearly entitled to judgment.

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Judgment for the plaintiff.

PETERSON against CLARK,

IN ERROR, to the Court of Common Pleas of the county of Madison.

Where land is conveyed absolutely, and the grantee, by a separate instrument, or defeasance, covenants to re-convey to the grantor on his paying a certain sum of money, the transaction amounts only to a mortgage. (a)

A mortgagee cannot maintain an action of waste against the mortgagor, at least until after a forfeiture of the mortgage.

And he has no property in trees cut down by the mortgagor, so as to maintain *trover* against him.

A person having an expectant interest in land, less than the inheritance, cannot maintain an action for waste. (b)

(a) *Vide Brown v. Dean*, 3 *Wendell's Rep.* 203. *Lane v. Sheara*, 1 *Ibid.* 463. *Rosevelt v. Neira*, of *Fulton*, 7 *Conn. Rep.* 71. *Dickinson v. Clark*, 6 *Ibid.* 147. *James v. Macy*, 2 *Conn. Rep.* 268. *Clark v. Henry*, *Ibid.* 321.

(b) *Vide Lane v. Hitchcock*, 14 *Johas. Rep.* 213.

in the possession and occupation, and that divers timber-trees, &c., were growing on the said lands and tenements, and parcel of the freehold and inheritance thereof, and that the defendant cut down and destroyed divers timber-trees, &c., and converted them to his own use. To this was added a count in trover for the conversion of one hundred pine-trees, one hundred oak-trees, &c., of the plaintiff. The defendant pleaded the general issue, and three special pleas, in which he alleged himself to be seised in fee of the premises, and denied the seisin of the plaintiff. The plaintiff replied, taking issue on the special pleas. The cause was tried at the *June* term, 1817, of the Court below.

At the trial, the plaintiff gave in evidence a patent issued the 30th of *November*, 1811, to *Isaac Van Camp*, for lot No. 81, in the *Cunastola* tract, in the county of *Madison*, which is the premises in question, and a deed with warranty, dated the 16th of *August*, 1815, for the same lot, from *Van Camp* to the plaintiff. A defeasance bearing even date with the deed between the plaintiff of one part, and *Van Camp* of the other part, was then given in evidence. This defeasance recited the deed, and that *Van Camp* was indebted to the plaintiff in the sum of 433 dollars and 28 cents, to be paid, with lawful interest, by the 16th of *August*, 1817, and the plaintiff covenanted, on payment of the said sum of money, to re-deliver the patent and re-convey the land to *Van Camp*, and that, on such payment, the deed from *Van Camp* to the plaintiff should become void, and his estate in the land should cease. It was further covenanted, that *Van Camp* should continue in possession of the premises free of rent for the space of two years from the date of the instrument, and that he should not commit waste on the premises; except the cutting of five pine-trees, and the necessary wood for his fire and fences, and whatever buildings he should see fit to erect on the premises, &c. The instrument was executed by both the plaintiff and *Van Camp*. *Van Camp*, afterwards, by assignment bearing date the 22d of *April*, 1816, in consideration of 1,000 dollars, assigned the defeasance to the defendant below, and his heirs and assigns. The plaintiff then proved that the defendant was in possession of the lot under the defeasance and assignment, and that he had cut timber to the value of 100 dollars. The defendant's counsel objected to the plaintiff's right to recover in this form of action, (a) and also insisted that the action was prematurely brought; but the Court overruled the objections, and charged the jury in favor of the plaintiff, who, accordingly, found a verdict for the plaintiff for 100 dollars.

The defendant below tendered a bill of exceptions to the

(a) Notwithstanding a lease may contain a covenant against waste, the lessor has still an election to bring an action on the case for waste committed during the term. *Kentyside v. Thornton*, W. Bl. Rep. 111. 2 Saund. 252, c.

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opinion of the Court, which was removed into this Court by writ of error, and was submitted without argument.

Per Curiam. There can be no doubt but that the deed from *Van Camp* to *Clark*, and defeasance given back, amounted only to a mortgage, (a) and the simple question then is, *whether a mortgagee can maintain an action of waste against the mortgagor, before the forfeiture of the mortgage; for the waste alleged to have been committed, in this case, was before the expiration of the time limited for the payment of the money secured by the mortgage. Indeed, the present suit was commenced before that time. Waste is an injury done to the inheritance, and the action of waste is given to him who has the inheritance in expectancy, in remainder, or reversion; but it is expressly laid down by *Blackstone*, (3 *Bl. Com.* 225.) that he who hath the remainder for life only, is not entitled to sue for waste, since his interest may never, perhaps, come into possession, and then he has suffered no injury. So, likewise, with respect to the mortgagee, especially when the mortgage is not forfeited, his interest in the land is contingent, and may be defeated by payment of the money secured by the mortgage; and it must follow, as matter of course, that he has not such interest in the timber as to sustain an action of trover. The judgment of the Court below must be reversed. (b)

Judgment reversed.

(a) *S. P. Day v. Dunham*, 2 *Johns. Ch. Rep.* 189.

(b) "An injunction lies against a mortgagor in possession to stay waste. The Court will not suffer him to prejudice the security." *Brady v. Waldron*, 2 *Johns. Ch. Rep.* 148.

ROTAN against FLETCHER.

In an action of trover, the defendant may show that the property of the goods was in a third person; or that the sale under which the plaintiff claims was made without the authority of the vendor; or that it was made in fraud of the creditors of the vendor. (a)

IN ERROR, on *certiorari* to a justice's Court.

This was an action of *trover* brought by the defendant in error against the plaintiff in error, for taking a cow. The defendant in error, who was plaintiff in the Court below, proved that the cow was delivered to him, as his property, by Mrs. *Hemmway*, the wife of *Thomas Hemmway*, to whom the cow belonged, and who had absconded, and that the *plaintiff said, that for the sake of securing an old debt, he would give Mrs. *Hemmway* 30 dollars for the cow; and that the cow was taken away by the plaintiff, and put into the possession of one *Stone*, from whom she was taken away by the defendant below, and one *Perkins*, on an attachment against *Hemmway*. The de-

(a) *Vide Kennedy v. Strong*, 14 *Johns. Rep.* 123. *Bush v. Lyon*, 5 *Cowen*, 52.

defendant offered to prove that the cow was not the property of the plaintiff, but of *Hemmiway*; that the sale by his wife to the plaintiff was to cover the property from his creditors, and that the plaintiff was to return the cow to her. The justice refused to admit this testimony, and a verdict and judgment were rendered for the plaintiff below.

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Per Curiam. It appeared from the plaintiff's own showing, that the cow in question was taken by virtue of an attachment against *Hemmiway*, and it is fairly to be inferred that the defendant in the Court below was aiding and assisting the constable in the execution of the attachment; but independent of this, the evidence on the part of the defendant should have been admitted: the action was *trover*, and it was competent for the defendant to prove property in a third person. The pretended sale from Mrs. *Hemmiway* did not transfer the property to the plaintiff below. She had no authority to sell the cow; and, besides, it was offered to be proved, that even this sale was fraudulent. The judgment must, accordingly, be reversed.

Judgment reversed!

CARPENTER and ROSE, Overseers of the Poor of Stephentown, against WHITMAN and another.

IN ERROR, on *certiorari* to a justice's Court.

The plaintiffs in error brought an action on the case, in *the Court below, against the defendants in error, for the maintenance of the bastard child of one A. G., of which the defendant, *Whitman*, was the putative father. On the trial, the plaintiffs produced in evidence a bond given by the defendants, conditioned to indemnify the town of *Stephentown* against the maintenance of the child from *May*, 1815, to *April*, 1818, and proved that the mother had brought a suit, and recovered a judgment against them for 25 dollars, for its maintenance, which judgment they had paid. The counsel for the defendants admitted that the plaintiffs had proved enough to recover, but moved for a nonsuit, on the ground that they had not shown that they were overseers. The motion was denied. The defendants then proved, by a witness who was one of the overseers at the time the bond was given, that it was agreed that *Whitman* should pay 50 cents per week to A. G.; that the justices made an order to that effect, and that *Whitman* complied with it, until *May* 1816, and then refused to pay, and demanded the

The defendant, by pleading
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the general issue, admits the character in which the plaintiff sues.

The mother of a bastard child, three or four years old, is entitled to its custody, and the putative father and his surety, on a bond given for the maintenance of the child, cannot exonerate themselves from liability by demanding the child.

An order of maintenance, legally made, cannot, afterwards, be vacated by two other justices

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child, and that the child was three or four years old. It was also proved that, about four weeks before the trial, the order of maintenance had been vacated for the purpose of preventing A. G. from suing the town any more. The jury found a verdict for the defendants.

Per Curiam. The proof introduced by the plaintiffs does not seem warranted by the form of action and pleadings in the cause, but no objection was made; and, besides, the defendants admitted that the plaintiffs had proved enough to recover. The judgment, therefore, must be reversed, unless the defendants, on their part, showed enough to destroy this right. The objection that the plaintiffs had not proved that they were overseers, was properly overruled. They sue in that capacity, and are described as such in the proceedings; and this was admitted by the plea of the general issue. The defendants, by the demand of the child, did not exonerate themselves from its maintenance. It was but three or four years old, and the mother was entitled to the custody. (2 *Johns. Rep.* 375.) The two justices had no authority to annul the order for maintenance, which had been previously, and, as we must presume, legally made; but admitting that they had such authority, the expenses for which this action was brought had accrued long before this was done. The judgment must, accordingly, be reversed.

Judgment reversed

PIKE against EVANS.

THIS was an action of *assumpsit*. The count in the declaration on which the plaintiff claimed to recover, stated, that the defendant was a tailor in the village of *Utica*, and on the 29th of *October*, 1814, in consideration that the plaintiff, at his request, had delivered him a large quantity of broadcloth and kerseymere, to be made up into a coat, pantaloons, and vest, for a large reward, he, the defendant, undertook to make and deliver them safe to the plaintiff, at *Sacket's Harbor*, by the next *Tuesday* following, to wit, on the 1st of *November*, 1814; yet that the defendant, not regarding, &c., would not make and deliver them to the plaintiff at *Sacket's Harbor*, but, on the contrary, so carelessly and negligently behaved and conducted himself with respect to the said clothes, that by his carelessness, negligence, and improper conduct, they were wholly lost to the plaintiff.

A variance between the declaration and proof must be objected to at the trial; and if not done then, the party cannot, afterwards, avail himself of it. A new trial will not be granted for the purpose of letting in cumulative evidence, as to matter which was principally controverted on the same trial. (a)

(a) Vide *The People v. Supreme Court of New-York*, 3 *Wendell's Rep.* 114. *Gyger v. Butts*, 4 *Id.* 579. *Whitbeck v. Whitbeck*, 9 *Cowen*, 266. *Jackson v. Crosby*, 12 *Johns. Rep.* 354.

plaintiff. The cause was tried before Mr. J. Platt, at the *Chenango* circuit, in *July*, 1818.

The plaintiff was aid to a general in the militia, who had been called out for the defence of *Sacket's Harbor*, with whom he was proceeding to that place, and on his way thither, on the 28th of *October*, 1814, called on the defendant, and left with him some cloth to be made into a military suit, and paid him for the making, the defendant promising to send the clothes, by the next week's stage, to *Sacket's Harbor*, so that they should be received by the plaintiff on **Tuesday*. The clothes were made up by the defendant, and sent on by the stage, but never reached the plaintiff. A witness on the part of the plaintiff testified, that he had asked the defendant if he had sent the clothes by the time he agreed; to which he answered "no," but that he sent them the week following. The defendant proved, by one of his workmen, that the clothes in question were made in a great hurry at the defendant's shop; that the witness assisted the defendant in making the coat, which was not usual, unless the defendant was particularly hurried; that some of the other workmen made the other clothes; that, as soon as they were finished, they were put into a package, on which was sewed a card, addressed to "Major Pike, *Sacket's Harbor*," and were taken out of the shop by the defendant, and a young man named *Miner*, to deliver at the stage-office, and that this took place on *Saturday* evening. *Miner* testified that he went with the defendant from the shop to the stage-house with the bundle of clothes, which he observed was done up, and directed on a card, but that he did not read the inscription, and that this was in the latter part of *October*, on *Saturday* evening. Another witness testified, that in the latter part of *October*, or beginning of *November*, the defendant left a bundle at the stage-office, directed to Major Pike, at *Sacket's Harbor*, and paid stage fare for it; but it did not appear to have been entered on the books of the office, and whether it was entered on the way-bill could not be ascertained, as the way-bills were regularly, at certain times, destroyed. The judge charged the jury, that if they believed that the defendant did not deliver the package at the stage-office in *Utica*, in season, so that, by the ordinary course of the stage, it might arrive at *Sacket's Harbor* on *Tuesday* next after the contract, then they ought to find for the plaintiff; because, if the defendant had broken his contract as to time, the risk was thereby varied without the consent of the plaintiff; but if the jury believed that the package had been delivered by the time agreed on, then he recommended a verdict for the plaintiff, subject to the opinion of the Court; whereupon the jury found a verdict for the plaintiff for 75 dollars, absolutely, on the ground that the package had not been sent in time.

*The defendant now moved to set aside the verdict, and for a new trial, on the ground that the verdict was against evidence,

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and that the contract proved varied from the one declared upon; and on the ground of newly-discovered evidence, as to which affidavits were produced of testimony, the object of which was to substantiate the delivery of the clothes at the stage-office in due time.

Talcot, for the defendant. He cited *Phillips's Law of Ev.* 160. *Penny v. Porter*, 2 *East*, 2. *Crawford v. Morrell*, 8 *Johns. Rep.* 253. *Smith v. Barker*, 3 *Day's Rep.* 312. *Vosburgh v. Thayer*, 12 *Johns. Rep.* 461. *Steinbach v. Col. Ins. Co.* 2 *Caines*, 129—133. *Norris v. Freeman*, 3 *Wils.* 38. *Broadhead v. Marshall*, 2 *Bl. Rep.* 955.

Parker, contra.

Per Curiam. The grounds on which an application for a new trial in this case is made, are,

1. That the verdict was against the weight of evidence.
2. That the contract proved is materially different from the one declared upon.
3. On the ground of newly-discovered evidence.

With respect to the first point, the verdict is warranted not only by the weight of evidence, but a contrary verdict would have been against the positive and direct testimony of one witness. The contract between the parties was, that the clothes in question were to be made, and sent on to *Sacket's Harbor*, by the stage that would arrive there, according to the course of the stages, on *Tuesday*, the 1st of *November*, 1814; and the material question, as it would seem from the judge's charge, was, whether they were left at the stage-office in *Utica*, in season to be sent on, according to contract. One witness swears positively, that the defendant, on being asked whether he sent them on by the time agreed, answered, "no; but he sent them the week following." There are, to be sure, some circumstances stated by the defendant's witnesses, which render it somewhat questionable, whether this witness could be correct. Though it was on *Friday*, the 28th of *October*, when the *plaintiff first spoke to the defendant about making the clothes, yet the proof is pretty strong to show the clothes were left at the stage-office on *Saturday* evening, which must have been the next day, or *Saturday* of the ensuing week. This, however, was a question fairly submitted to the jury, and we cannot think it fit and proper to set aside the verdict on this ground.

2. With respect to the alleged variance, admitting it to be well founded, the objection should have been made on the trial and the defendant comes too late now to call that in question.

3. The newly-discovered evidence is material to make out the delivery of the clothes by the time agreed on, and the only objection to granting a new trial on this ground is, that it is merely cumulative testimony. This must have been known to

the defendant to be a material question on the trial. The newly-discovered evidence does not relate to any new fact; and it has been repeatedly decided by this Court, that a new trial ought not to be granted, merely for the discovery of cumulative facts and circumstances relating to the same matter, which was principally controverted on the former trial. (2 *Caines*, 129. 8 *Johns. Rep.* 86.) The motion for a new trial must, accordingly, be denied.

Motion denied.

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PLATT against JOHNSON and ROOT.

THIS was an action on the case for obstructing the waters of the *Cincinnatus Creek*, in their ancient course across the defendant's land, to the plaintiff's grist and saw mills, erected on his land lower down the stream, whereby the waters of the creek were withheld from the plaintiff's mills, and the plaintiff deprived of the profits of his mills. The cause was tried before Mr. Ch. J. *Thompson*, at the *Oneida* circuit, in June, 1817.

The plaintiff, being possessed of land lying on both sides of the creek, in 1797 erected a saw mill and dam on the creek: in 1805 and 1806 he erected a grist mill near the other, the dam answering for both mills; and in 1810 he built a new grist mill at a short distance below the first mills; all which mills had been in use from the time of their first erection. In 1809, the proprietors of the farm, afterwards held by the defendants, built a dam across the creek, about sixty rods above the plaintiff's dam, with a fulling mill, and in 1812 erected a carding machine near to it. The defendants purchased their mills, and entered into possession about two years before the trial. By means of their dam, the water of the creek was detained while the pond of the defendants was filling, and in very dry seasons, especially in 1816, the plaintiff had, occasionally, to wait for the water, until the defendants had raised a pond sufficient to turn their mills; and in one instance, when the water was uncommonly low, the gate of the defendants was kept shut for nearly three days, during which time the plaintiff's mill was stopped: on other occasions it was stopped for a less time, and the plaintiff's customers had been obliged to carry their grain to other mills. The water, after having been used by the defendants, was turned immediately into the natural channel, about sixty rods above the plaintiff's mills; and the defendants had in no instance shut down their gates, except for the purpose of raising a pond for

A person erecting a mill and dam upon a stream of water, does not, by the mere pri-

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or occupation, unaccompanied with such a length of time as that a grant may be presumed, gain an exclusive right, and cannot maintain an action against a person erecting a mill and dam above his, by which the water is, in part, diverted, and he is, in some degree injured. 16

(a) Vide *Canal Commissioners v. The People*, 5 *Wendell's Rep.* 423. *Rich v. Penfield*, 1 *Ibid.* 390. *Sackrider v. Beers*, 10 *Johns. Rep.* 241. *Merritt v. Brinkerhoff*, 17 *Id.* 306. See, also, 7 *Cowen*, 266. 8 *Id.* 175.

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the use of their works, which required a greater quantity of water than the plaintiff's, at whose mills the fall of water was so great, that the usual quantity in the stream, at ordinary seasons, would carry his mills at good speed, and in dry seasons, the grist mill would grind from ten to twenty bushels in a day. It appeared that the plaintiff had taken some measures to turn away the waste water from the defendant's dam into a channel for the use of his mills. It also appeared in evidence, on the part of the defendants, that there had been little or no complaint on the part of the plaintiff, until 1816, which was a dryer season than had ever been known before; that *the plaintiff might so alter his dam as to save all the waste water, that the plaintiff's mills were turned with much more force and speed, when the defendants raised their gates, by reason of the increased quantity of water, and that when his grist mill had a full head of water, it would grind sixty or seventy bushels a day.

A verdict was found for the plaintiff, for 25 dollars, which, by consent, was made subject to the opinion of the Court on a case containing the facts above stated.

Sill, for the plaintiff. The parties ought to use the water of this creek so as not to injure each other. The maxim *Sic utere tuo, ut alienum non ledas*, applies. Strictly and technically, this may not be *diverting* a natural water course; but it is, substantially, that case; for the defendants, by erecting their dam, have detained the water from the use of the plaintiff, for several days at a time. Suppose a natural stream used by the public for watering cattle; would the defendants be allowed, by erecting a dam, to detain the water for his particular use, for several months? It may be said, perhaps, that the defendants could not make use of their mill, unless they filled their mill pond, so as to gain a sufficient head of water for the purposes of the mill. But this is no answer to the plaintiff; for it was the folly of the defendants to erect a mill where there was no natural mill seat, or fall of water. The plaintiff, having erected his mills first, is entitled to a preference in the use of the water. Prior occupancy gives a superior title. The general principle on this subject is well laid down by *Blackstone*. (2 *Bl. Com.* 402, 403.) "If a stream," says he, "be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow; for he hath, by the first occupancy, acquired a property in the current." The same principle is adopted by *Woodeson*. (2 *Woodes. Lect.* 391.) The general doctrine of these elementary writers is supported by adjudged cases. (*Brown v. Best*, 1 *Wils.* 174. 15 *Viner. Abr.* 399. *Mill. (C.) Cox v. Matthews*, 1 *Vent.* 237. *Palms v. Heblethwait*, *Skin.* 65. 175. *Duncomb v. Randall*, *Hetley*, 32. 34. *Bealy v. Shaw*, 6 *East*, 208. 16 *Viner. Abr.* 25—29. *Nuisance*, *G. *s.* 7, 8, 9. *Id. (H.)* pl. 20.) The case of *Bealy v. Shaw* is in point. The Court of King's Bench 170

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there held, that the owner of land through which a river runs, could not, by enlarging the channel through which the water had been used to flow before any appropriation of it by another, divert more of the water, to the prejudice of another person lower down on the river, who had, before the channel was enlarged, appropriated to himself the surplus water which did not escape by the former channel. So, in *Sackrider v. Beers*, (10 *Johns. Rep.* 24.) this Court decided, that though the owner of land on a public river had a right to erect a mill on his land, yet he must so construct his dam, and so use the water, as not to injure his neighbor below, in the enjoyment of the same water, according to its natural course.

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Talcot, contra. A purchaser of land over which a stream of water runs, acquires a right to use the water in a reasonable manner, for the ordinary purposes of mills or machinery, there being no ancient right or prescription in the case. And if, in the reasonable use of the water, for such ordinary purposes, the owner of land below suffers any damage, it is *damnum absque injuria*. Baron *Comyns* lays down the rule that an action on the case does not lie for a reasonable use of one's right, though it be to the annoyance of another. (1 *Comyns's Dig.* 305. *Action on the case for a nuisance*. (C.) And he puts the case of a man building a house, who digs his cellar on his own soil, by means of which a newly-built house on the adjoining land falls down. (1 *Sid.* 167. 2 *Roll.* 565. l. 5.) The plaintiff is bound to prove an exclusive right to the use of the water, by such evidence as affords the presumption of a grant. It is not enough to show merely a prior occupancy. It is so laid down in *Bealy v. Shaw*, (6 *East*, 208.) and in *Palmer v. Mulligan*, (3 *Caines's Rep.* 307.) The plaintiff has shown a possession for no more than eight or ten years. In regard to the new grist mill, the defendants are, in fact, the prior occupants.

There is no difference, in respect to the rights of these parties, between an artificial and a natural mill seat. The plaintiff, from the natural elevation of his ground, has a superior advantage; but there is no reason why the defendants *may not, by artificial means, gain the use of the water, for the purpose of machinery.

Again; the damages are too small to afford a ground for this action. There must be a *damnum et injuria*. Where the act, of itself, is *injuria*, though the damages be trifling, yet an action lies; but if the act is not, of itself, injurious, the damages must be great and serious to furnish a cause of action. The mere fact that the plaintiff's mill pond is not so well supplied with water as it was before the defendants erected their dam, is not sufficient to support this action. Thus *Comyns* mentions a case: If a man use water in his own land out of a water course running through his land to the pond of B., whereby B.'s pond is not so full, if he does not divert the water course.

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an action does not lie. Now, in this case, it is not pretended that the water course has been diverted. In *Bealy v. Shaw*, not merely a portion of the water, but the whole stream, was actually diverted. But the case of *Palmer v. Mulligan*, (3 *Caines*, 307.) is strong and conclusive against the plaintiff.

Sill, in reply insisted, that there was no such principle in the law, that the prior occupancy of a stream of water must be for so long a period of time as to afford the presumption of a grant; nor did it make any difference whether one mill was erected above or below the other. It was absolutely necessary to make an artificial mill seat. In *Palmer v. Mulligan*, there was a motion for a new trial, and the damages were very small; and two of the judges, (*Kent*, Ch. J., and *Thompson*, J., dissented. If a jury find damages, however small may be the amount, if they are not merely nominal, the Court are bound to give judgment for the plaintiff.

THOMPSON, Ch. J., delivered the opinion of the Court. The question involved in the decision of this case may, perhaps, be considered as one of the first impression. I cannot persuade myself, however, that the claim set up by the plaintiff can be sustained upon any principles of law recognized in our Courts. The principle sought to be established is, that a previous occupancy of land upon a stream of water, *and an appropriation of the water to the purposes of a mill, gives such a right to the stream, in its whole extent above, as to control the use of the water, so as to prevent any subsequent occupant from using or detaining the water, to the least injury or prejudice of the first occupant. Unless the principle thus broadly stated can be supported, the plaintiff must fail in the present action; for there is no color for charging the defendants with having diverted the natural course of the stream, or unnecessarily wasting the water, or wantonly detaining it longer than was reasonable and necessary for their own machinery and water works; nor is there any pretence that the plaintiff had been so long in the previous use and enjoyment of this stream of water, as to afford the presumption of a grant of the same beyond the bounds of his own land. The plaintiff's right, therefore, if any legal right exists, must grow out of the mere fact of his having first erected his mill. To give such an extension to the doctrine of occupancy, would be dangerous and pernicious in its consequences. The elements being for general and public use, and the benefit of them appropriated to individuals, by occupancy only, this occupancy must be regulated and guarded, with a view to the individual rights of all who may have an interest in their enjoyment; and the maxim *Sic utere tuo, ut alienum non lædas*, must be taken and construed with an eye to the natural rights of all. Although some conflict may be produced in the use and enjoyment of such rights, it cannot be considered, in judgment of

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law, an infringement of the right. If it becomes less useful to one, in consequence of the enjoyment by another, it is by accident, and because it is dependent on the exercise of the equal rights of others. Many general and public considerations might be resorted to, to enforce and establish this doctrine. But I think this question falls within the principles fully recognized by this Court in the case of *Palmer v. Mulligan*, (3 Caines, 313.) Though there was a difference of opinion on the bench, as to the result of the motion in that case, yet this difference did not, in any measure, turn on the question presented by this case. *Spencer, J.*, said, the act of erecting a dam by the defendant was a lawful act; and though, in its consequences, slightly injurious to the plaintiffs, *they were remediless: it was *damnum absque injuria*. The erection of dams on all rivers is injurious, in some degree, to those who have mills on the same streams below, in *withholding* the water; yet this had never been supposed to afford a ground of action. *Livingston, J.*, said, each one had an equal right to build his mill, and the enjoyment of it ought not to be restrained, because of some trifling inconvenience to the other; and he utterly rejected the doctrine, that the person erecting the first mill thereby acquired any superior rights. Were the law, he observes, to regard little inconveniences of this nature, he who could first build a dam or mill on any public river would acquire an exclusive right, at least for some distance; for a second dam could not be built, unless at a considerable distance, without producing some mischief or detriment to the owner of the first. Here the principle on which the plaintiff rests is directly met, and treated as leading to extravagant consequences, altogether inadmissible.

Although I differed from the opinion of the Court in that case, it was upon the ground that the plaintiff had acquired a superior right by a prior enjoyment of the water, in a particular manner, for forty years, which was sufficient to raise the presumption of a grant; and the chief justice, who also dissented from the majority of the Court, rejected the doctrine set up by the plaintiff in this case. Many cases, said he, may be supposed, which would be *damnum absque injuria*; such as the insensible evaporation and decrease of the water by dams, or the occasional increase or decrease of the velocity of the current, and the *quantum* of water below. Many such circumstances may be inevitable from the establishment of one dam above another upon the same stream. I have been thus particular in noticing the several opinions in this case, because, if the principles which seem there to be taken for granted by the whole Court, are well founded, they are in direct hostility to the plaintiff's right of action. There is no ground, in point of fact, if that could make any difference in the principle, for alleging that there was no *natural* mill seat or fall, where the defendant's works are erected. There is enough for every purpose for which

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the defendants have, and had, a *right to use the water. The Court are, accordingly, of opinion, that the defendants are entitled to judgment.

Judgment for the defendants.

COLDEN against ELDRED.

The remedy by distress and sale of beasts, *damage feasant*, given by statute, sess. 36. c. 52. s. 19. (2 N. R. L. 131.) (a) does not take away the common law remedy by action of trespass. (b)

Where beasts, *damage feasant*, have been distrained, or even impounded, the distrainer may relinquish the proceedings by distress, before satisfaction for the damage which has been sustained, and bring the action of trespass.

In an action for trespass by cattle, it is matter of defence, and to be shown by the defendant, that the fence which the plaintiff was bound to keep in repair was defective.

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IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action of trespass in the Court below against the plaintiff in error, for damage done to his grain by the sheep of the latter. The plaintiff below proved the trespass and damages, and the defendant below offered proof to show, that the sheep had been distrained and impounded by the plaintiff: the evidence, being objected to, was excluded by the justice. A verdict was found for the plaintiff below.

Per Curiam. The only question in this case is, whether the defendant ought not to have been permitted to prove that the sheep had been distrained and impounded for the same trespass. The remedy, by distress, given by the statute, is cumulative, and the plaintiff may, if he pleases, pursue the common law remedy by action of trespass. Had the plaintiff followed up his remedy by distress, according to the provisions of the statute, or had the merits of his right to recover been tried, it would have been a bar to the action of trespass. But the defendant's offer did not go far enough. The distress offered to have been proved does not appear to have been followed up by the plaintiff; there might have been some irregularity which rendered it necessary for him to abandon it; and the mere distress, or even impounding, if relinquished, would be no satisfaction for the injury. This part of the defence was; therefore, properly excluded. The evidence showed, very satisfactorily, that the sheep got over that part of the fence which for several years had been kept up by the defendant as his part of the *division fence; and this was enough, at least, *prima facie*. What the situation of the fence was, or whether there were any rules or regulations of the town on the subject, does not appear. It, however, was matter of defence, and to be shown, on the part of the defendant, if any thing existed which would excuse the trespass. The judgment must, therefore, be affirmed.

Judgment affirmed.

(a) 2 R. S. 517.

(b) Vide *Turnpike Co. v. Country*, 10 Johns. Rep. 389. *Almy v. Harris*, 4 Id. 174.

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HOYT against GELSTON.

THIS cause, (see vol. 13. p. 561—590.) having been carried by writ of error to the Supreme Court of the *United States*, was there affirmed, with damages and costs. The judgment of affirmance was rendered on the 27th of *February* last, and the mandate of the Supreme Court of the *United States* to this Court was presented and filed the first day of the term. The Court above awarded the interest at the rate of six per cent.; and a question now arose, on the taxation of costs, whether the interest was to be computed to the first day of this term, or only to the 27th of *February*, when the judgment of affirmance was given, there being no direction, in the mandate of the Supreme Court of the *United States*, as to the time to which the interest was to be computed.

RYCKMAN
v.
HAIGHT.
Where a judgment of the Court of Errors, affirming a judgment of this Court, is affirmed by the Supreme Court of the *United States*, on a writ of error from that Court, interest on the judgment is allowed only to the time of rendering the last judgment of affirmance.

Hoffman, T. A. Emmet, and C. Graham, for the plaintiff.

Baldwin, contra.

Per Curiam. This Court cannot pronounce any new judgment in this case. It can only carry into effect the judgment of the Supreme Court of the *United States*. In the computation of interest, therefore, the taxing officer must not go beyond the time of the judgment of affirmance, that being *the last act of the Court above. The practice in this respect, in our state Courts, is regulated by statute, which cannot apply to this case.

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RYCKMAN and another against HAIGHT.

THIS was an action of *assumpsit*, for work and labor, and materials found, and goods sold and delivered; and the declaration also contained the usual money counts.

The plaintiff in the bill of particulars of his demand not obliged to state this or

B. Haight, for the defendant, moved for judgment as in case of *non pros*, on the ground that the plaintiffs had not furnished to the defendant a bill of the particulars of their demand, pursuant to the order of the recorder of *New-York*, for that purpose (*Fleuret v. Durand*, 14 *Johns. Rep.* 329.)

Wilson, contra, read an affidavit, stating that the plaintiffs were ready to deliver to the defendant a bill of the parti-

(a) *Gay v. Cary*, 9 *Cow. Rep.* 44.

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of their demand; but to enable them to state the *credits* with accuracy, they had applied to the defendant for an account of the moneys he had paid to them, which he had refused to give.

He stated, on the authority of the case of *Adlington v. Appleton*, (2 *Campb. N. P. Cas.* 410.) that unless the plaintiffs could also state the credits, so as to show the precise balance claimed by the plaintiffs, it would not be a compliance with the judge's order; yet the plaintiffs were ready to give the particulars of the debit side of their account, and of the credits, so far as they were known.

Per Curiam. The practice of this Court is merely to compel the plaintiff to specify the particulars of his demand. We consider the bill of particulars as an amplification of the counts in the declaration. The defendant must know, as well as the plaintiffs, what sums he has paid, and *if he is furnished with the debit side of the account, he can readily ascertain the balance claimed.

The defendant must take his rule, that the plaintiffs furnish a bill of the particulars of their demand, exclusive of credits for payments by the defendants, in ten days, or that a judgment of *non pros* be entered.

Rule accordingly.

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VAN DEUSEN and VAN DEUSEN *against* VAN SLYCK and Wife.

IN ERROR to the Court of Common Pleas of the county of *Montgomery*.

In actions for *torts* against several defendants, who join in pleading the general issue, if there is no evidence against one of the defendants, the court ought to find that

This was an action of trespass for an assault and battery, brought by the defendants in error against the plaintiffs in error, to which the defendants pleaded the general issue jointly, and the cause was tried at the *June* term, 1817, of the Court below. At the trial, after the plaintiffs below had gone through with their evidence, the counsel for the defendants applied to the Court for the discharge of *John G. Van Deusen*, one of the defendants, on the ground that there was no proof against him, in order to give the other defendant the benefit of his testimony. The counsel for the plaintiffs objected to his discharge, that the defendants had joined in pleading the general issue; and the Court, for this reason, decided that they could not discharge the defendant, although they were of opinion that there was no testimony against him, on which the jury could find

174 *Schermerhorn v. Schermerhorn*, 1 *Wendell's Rep.* 119 *Bohun v. Taylor*, 6 *Rep.* 313.

him guilty. The defendants excepted to the opinion of the Court, and a verdict having been found for the plaintiffs below, the bill of exceptions was removed into this Court, by writ of error.

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Conklin, for the plaintiffs in error. He cited *Buller's N. P.* 285. *Phil. L. of Ev.* 61. *Brown and others v. Howard*, 14 *Johns. Rep.* 119. 1 *Saund.* 107. n. 2.

* *Cady*, contra.

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Per Curiam. This case comes before the Court on a writ of error to the Common Pleas of *Montgomery* county. It was an action of assault and battery; and, upon the trial, no evidence having been given against the defendant, *John G. Van Deusen*, application was made to the Court for his discharge, that he might be examined as a witness for the other defendant. The Court admitted that there was no testimony against him upon which he could be found guilty, but decided that they could not discharge him, because both defendants had joined in one plea. In this they erred. In actions for torts against several, although they join in the plea of not guilty, one may be found guilty and the other not guilty. The rule has been long and well settled, in such actions, that where there is no evidence against one of the defendants, he is entitled to his discharge, and may be examined as a witness for the other defendants. If this were not allowed, great injustice might be done by including witnesses in the suit, for the express purpose of shutting out their testimony. (2 *Exp. Dig.* 364. *Phil. Ev.* 61. 6 *Bin.* 316. 14 *Johns. Rep.* 122.) The judgment must, accordingly, be reversed

Judgment reversed.

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HOAR

v.

CLUTE.

Where a person engages to labor for another for a year, [* 225] at a certain price for the whole time, and on leaving his service before the expiration of the year, it not appearing that he went away without his consent, the hirer gives him a draft, in consideration of his past services, which was not paid nor accepted by the drawee, in an action on the draft by the payee against the drawer, the latter cannot defeat the recovery by introducing the original contract of service.

(a) An order, not negotiable, for the payment of money, and which has not been paid or accepted by the drawee, is not a payment or extinguishment of a precedent debt. (b)

HOAR *against* CLUTE, by BENSON, his Guardian.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below, against the plaintiff in error, for work and labor, and upon an order drawn by the defendant below, in favor of *the plaintiff below, upon *Ann C. Hoar*, dated *March 22d*, 1817, for 15 dollars. The plaintiff below proved the presentment of the order to the drawer, who refused to pay it, and that the payment was afterwards demanded of the defendant, who refused, alleging that the plaintiff had run away or left his service. The defendant produced a contract, entered into between the defendant and the plaintiff and his father, by which the plaintiff was to work for the defendant for one year, at 120 dollars. It appeared that the plaintiff began to work some time in *January*, and left the defendant on the day of the date of the order; but whether with the defendant's consent, or not, did not appear; and there was no evidence of any complaint at the time, on the part of the defendant, on account of his leaving him. The jury found a verdict for the plaintiff below, for the amount of the order.

Per Curiam. The judgment must be affirmed. It was in proof that the plaintiff had labored for the defendant between two and three months, and the amount recovered was not more than an adequate compensation, according to the rate agreed on for the year. The contract, it is true, was for a year, but the circumstances disclosed by the evidence afford a reasonable presumption that such contract was rescinded, and that the plaintiff quitted the defendant's service with his consent. The order for the fifteen dollars bears date the very day on which he left the defendant, and no complaint appears to have been made at the time. There was, at all events, a consideration for the order, and it must be considered as advanced upon the plaintiff's wages, and not having been accepted, and payment having been refused by the defendant, there can be no good reason why he should not pay it. (c) It could not be considered a payment or extinguishment of the plaintiff's demand: it was not negotiable, nor had it been paid by the person on whom it was drawn, so that the defendant could not, in any way, be exposed to a second responsibility for the same demand.

Judgment affirmed

(a) *Rapelye v. Mackie*, 6 Cow. Rep. 250.

(b) Vide *Ingersol v. Van Bockkellin*, 7 Cow. Rep. 670.

(c) Vide *Thorpe v. White and others*, 13 Johns. Rep. 55

NEW-YORK,
May, 1818.***JACKSON, ex dem. MINER and MINER, against BONEHAM.**

JACKSON

v.

BONEHAM.

THIS was an action of ejectment brought to recover part of lot No. 83, in the former township of *Milton*, now *Geneva*, in the county of *Cayuga*. The cause was tried before Mr. J. *Spencer*, at the *Cayuga* circuit, in June, 1817.

The plaintiff produced in evidence an exemplification of letters patent, dated the 13th of *September*, 1790, to *Moses Minner*, for lot No. 83, in the township of *Milton*, in *Montgomery* county, excepting 100 acres out of the south-east corner of the lot. *Esther Miner* was called as a witness on the part of the plaintiff, who testified, that she was the sister of *Moses Miner*, and of the lessors of the plaintiff, and that *Moses Miner* was, by trade, a gunsmith, and lived at *Stonington* in *Connecticut*, and about the year 1774 went to sea. The witness also proved a letter from *Miner* to his mother, dated at *New-York*, in *September*, 1775, in which he says that "he had got to be a soldier." She heard, in 1776, that he was with the *New-York* troops, but never heard of him again until fourteen years after the war, when she was told that he had been killed; that the general opinion in the family was, that he was dead, and that he always spelt his name *Minor* and *Miner*, and not *Minner*. The testimony as to the death of *Moses*, and his being with the *New-York* troops, was objected to as hearsay, but was admitted by the judge. The plaintiff also gave in evidence a sworn copy of the records of the town of *Stonington*, which contained the date of the marriage of the parents of the lessors, and the time of the birth of their children. This memorandum was objected to, but was admitted by the judge.

The defendant gave in evidence a deed for the premises dated *August* 29th, 1791, from *Ebenezer Minor*, describing himself as "heir at law to the estate of *Moses Minor*, deceased, late a private in the first *New-York* regiment, mariner," to *William I. Vredenburg*, in fee. It appeared from the testimony of *Esther Miner*, that she and the plaintiff's lessors were the only surviving heirs of *Moses Miner*; and it was admitted, that if the plaintiff was entitled to recover, the defendant ought to be compensated for his improvements. A verdict was taken for the plaintiff, subject to the opinion of the Court.

Richardson, for the plaintiff.

Foot, contra. He cited *Jackson, ex dem. Shultze, v. Goes*, 13 *Johns. Rep.* 518—523.

Thompson, Ch. J., delivered the opinion of the Court. The

(a) *Jackson v. Cody*, 9 *Cow. Rep.* 140. *Jackson v. King*, 5 *Cow. Rep.* 237. *Jackson v. Kitz*, *Ibid.* 314

In an action of ejectment brought by the heirs of *Moses Miner*, the plaintiffs claimed under a patent issued to *Moses Minner*, a soldier in the *New-York* line during the revolutionary war; it was held that the patent was *prima facie* evidence of the service of the soldier mentioned in it; and as it did not appear that there was any man in the army by the name of *Minner*, the variance must be considered a mere misspelling of the name, which could not affect the identity of the person, and did not make it a distinct name; and besides, the defendant claimed under a soldier of the name of *Moses Minor*, who, there was strong evidence to show, was the same as the person under whom the lessors claimed. (a)

Hearsay is admissible as evidence of the death of a person.

It seems that a register of marriages and births, kept in the records of a town, is evidence of pedigree and lineage.

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premises in question are a part of lot No. 86, in the old township of *Milton*, and are claimed by the lessors of the plaintiff under a patent to *Moses Minner*, bearing date the 13th of September, 1790. The principal question in the case is, as to the identity of the soldier. The patent is *prima facie* evidence of the service, as a soldier, of the person mentioned in the patent; and where there appears to have been two persons of the same, or nearly the same name, in the service, it is, sometimes, difficult to identify the patentee. But in the case before us, the only difficulty appears to arise from the name being spelled *Minner*, instead of *Miner*. It is evident, that the soldier under whom the lessors claim wrote his name *Miner*; and if it had been shown that there had been in the army any man by the name of *Minner*, the patent would be deemed to have issued to him; but nothing of that kind appearing, it must be considered a mere misspelling of the name, which cannot affect the identity of the person; nor is it such a difference in the spelling as to make it a distinct name. Besides, the defendant himself sets up a title derived from a soldier by the name of *Moses Minor*. The grantor in the deed under which he claims describes himself as the heir at law of *Moses Minor*, deceased, late a private in the first *New-York* regiment, *mariner*. And the evidence in the case is very strong to show that this is the same person under whom the lessors derive title. It appears, by the testimony of his sister, that he left *Stonington*, in *Connecticut*, in the year 1774, and went to sea. And she produced a letter from him to his mother, dated at *New-York*, in September, 1775, which mentions *that he had got to be a soldier, (as he expressed himself.) Thus it appears that the soldier under whom the plaintiff claims went to sea in the year 1774, and entered the service in the fall of 1775; and in the defendant's deed he is described as a *mariner*, which is a pretty strong circumstance to show that both parties claim under the same person.

The hearsay evidence offered and objected to, of *Moses Minner* being with the *New-York* troops, and of his being killed in the army, was admissible for the purpose of showing his death, and the place where he died, but would not, of itself, afford any evidence of his having served in the army as a soldier entitled to bounty land.

We do not perceive any objection to the admission of a sworn copy of the records, of the town of *Stonington*, as evidence of the family of *Moses Miner*. But this was unnecessary proof; the fact was sufficiently established by his sister, *Esther Miner*. From her testimony, it appears that the lessor of the plaintiffs and herself are the only surviving heirs of her brother *Moses*. They are, accordingly, entitled to recover two thirds of the premises in question. The defendant claims under a deed from *Ebenezer Minor*, who calls himself the heir at law of *Moses Minor*; but there is no evidence of that fact, nor any thing showing who *Ebenezer Minor* is.

It was admitted on the trial, that if the plaintiff had a right to recover, the defendant was entitled to compensation for his improvements. The plaintiff must, accordingly, have judgment for two thirds of the premises in question, with stay of execution until the improvements have been paid for, pursuant to the act in such case made and provided.

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v.
JONES.

Judgment for the plaintiff.

*SMITH *against* JONES.
THE SAME *against* THE SAME.

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IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought two actions in the Court below, against the plaintiff in error, for goods sold and delivered, &c. The defendant pleaded, and also produced an account as a set-off. The evidence on the trial was decidedly in favor of a balance against the plaintiff below, except as to three barrels of pot ashes, which, as far as there was any evidence of a sale, appeared all to have been sold at one time; yet the plaintiff in one action claimed for one barrel only, and for the residue in the other. The only evidence of the sale was the confession of the defendant, made five or six years before the trial, but who, at the same time that he admitted the purchase, alleged that he had paid for the ashes, and agreed that if his son John did not swear that they had been paid for, he would pay for them. The plaintiff had spoken to the defendant's son John, who had since died, on the subject, and he replied that he could swear that all the ashes had been paid for. It was proved that the plaintiff below had, on some occasion, declared, that if the defendant's son John was dead, he could get pay for the three barrels of ashes. Verdicts were found for the plaintiff below, in both causes.

Where the plaintiff has an entire demand, he cannot divide it into distinct parts, and bring separate actions for each; as, on an entire contract of sale of goods, he cannot maintain an action for one part of the goods sold, and another action for another part.

The defendant's confession that he had purchased the goods, but had paid for them, is not sufficient to entitle the plaintiff to recover in an action for the price.

Per Curiam. The only matter in question, in these causes, is the three barrels of pot ashes. There is no pretence, from any part of the evidence, that these ashes were sold at different times, or in different parcels; but the natural and necessary conclusion to be drawn from the evidence is, that it was an entire contract for the whole quantity; and yet the plaintiff has set up and divided this entire demand into separate suits, which, of itself, would be a fatal objection to the judgments. But, independent of this, there was no proof to sustain

(a) Vide *Phillips v. Berick*, 16 Johns. Rep. 136. *Butler v. Wright*, 2 Wendell's Rep. 283. *Miller v. Covert*, 1 *Ibid.* 487. *Connell v. Cook*, 7 Cow. Rep. 310. *Farrington v. Smith*, *infra*, 432.

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the recovery. The same testimony that proved the sale, proved also the payment. *(3 Johns. Rep. 427. 9 Johns. Rep. 141.) Besides, the great delay on the part of the plaintiff in bringing these actions, casts a suspicion on the claim; and more particularly as he waited until the witness was dead, from whom he himself had learnt, that he could swear to payment. The judgments must be reversed.

Judgments reversed.

SILL against ROOD.

In an action on a promissory note given for the price of a chattel, the defendant may, under the general issue, show deceit in the sale. (a)

A promissory note given on the sale of a chattel, fraudulently represented by the seller to be of great value, when, in fact, it was of no value, is without consideration, and void.

THIS was an action of *assumpsit* on two promissory notes. The defendant pleaded *non assumpsit*, with notice of set-off, for goods sold, work and labor, money had and received, &c. The cause was tried at the *Onondaga* circuit, before Mr. J. Spencer.

At the trial, the plaintiff having proved the notes in question, the defendant offered to show, that they were given by the defendant to the plaintiff in payment for a shearing machine, and that, at the time of the sale, the plaintiff falsely represented the machine to be of great value, when, in fact, it was worth nothing. This testimony was objected to, on the ground that it was not admissible under the plea or notice, and was rejected by the judge. The defendant then offered to prove a breach of warranty as to the value and utility of the machine, which testimony was objected to, and excluded on the same ground; and the judge ruled, that neither the fraud nor breach of warranty, although they went to take away the plaintiff's whole cause of action, could be given in evidence under the plea of *non assumpsit*, without notice. A verdict was found for the plaintiff for the amount of the notes, and the defendant now moved for a new trial.

The case was submitted to the Court without argument, on a reference to authorities.

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**Per Curiam*. The only question in this case is, whether, under the plea of *non assumpsit*, it is competent to give in evidence that the note was fraudulently procured, or that it was given without consideration. The evidence offered, and which was excluded, was, that the notes in question were given in payment for a shearing machine sold by the plaintiff to the defendant; that the plaintiff made certain representations with respect to the usefulness of the machine, which were utterly false, and

(a) Vide *M'Allister v. Reab*, 4 *Wendell's Rep.* 483. *Burton v. Stewart*, 3 *Ibid.* 236. *Gleason v. Clark*, 9 *Cow. Rep.* 57. *Hills v. Bannister*, 8 *Cow. Rep.* 31. *Slade v. Halsted*, 7 *Ibid.* 322. *Frost v. Everett*, 5 *Cow. Rep.* 497. *Beecker v. Vrooman*, 12 *Johns. Rep.* 302.

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that known to him at the time; and that the machine was, in fact, worth nothing, and totally useless. This evidence was overruled, on the ground that a special plea or notice under the general issue was necessary in order to let in such defence. The cases on this subject do not seem to warrant so rigid a rule. The rule, as laid down by *Chitty*, (1 *Chitty*, Pl. 472.) and which is sanctioned by adjudged cases, is, that under the general issue of *non assumpsit*, any matter may be given in evidence which shows that the plaintiff *never* had cause of action; and that under that plea most matters in *discharge* of the action, which show that, at the time of the commencement of the suit, the plaintiff had no subsisting cause of action, may be taken advantage of under the general issue. This rule has been expressly sanctioned by the Court in the case of *Wilt v. Ogden*, (13 *Johns. Rep.* 56.) If the notes in question were procured upon such fraudulent representations, they were utterly void, and without consideration, and there never was any cause of action. The case of *Runyan v. Nichols*, (11 *Johns. Rep.* 547.) was not like the present: the defence there set up was considered as going only to reduce the amount of the plaintiff's claim, and not to destroy the cause of action entirely. (a) It was a

(a) That was an action by an attorney to recover his costs; and the defendant offered to show negligence in the conduct of the suit. In *Temper v. M'Lachlan*, (5 *Bos. & Pull.* (2 *N. R.*) 136.) such a defence was not allowed under the general issue, though *Munsfield*, Ch. J., seemed to think that it might be admitted, if the negligence was so great as to deprive the defendant of all benefit from the suit. In *Mills v. Bainbridge*, there cited by *Shepherd*, arguing, Lord *Ellenborough* is said to have ruled, that in an action for freight of goods, the defendant could not give in evidence the injury the goods had sustained by bad stowage out must resort to his cross action. There can be no doubt, that if admissible as all as a defence, it may be made under the general issue in *assumpsit*; but the difficulty is, that by admitting such a defence, the plaintiff may, in some cases, be taken by surprise, contrary to the just principle of *pleading*, which requires that the facts on which the party relies should be stated so as to apprise the opposite party of what is meant to be proved, in order that he may be prepared to answer or contest it. (1 *Chitty*, Pl. 215, 472.) In *Basten v. Butler*, (7 *East*, 479.) which was an action for work and labor, &c., Lord *Ellenborough* seemed to think that there was a distinction between an action for a specific sum agreed on, and where the plaintiff proceeded on a *quantum meruit*; that in the latter case, the plaintiff must come prepared to prove that he has not only done the work, but that he ought to have so much for it, and, therefore, could not be surprised by such a defence. But *Lawrence*, J., thought that, even in the first case, the defendant ought to be let into the defence, if he had given the plaintiff notice that he meant to dispute the goodness or value of the work done. And *Le Blanc*, J., was of opinion, that, in either case, the plaintiff ought to come prepared to show that he had done his work properly, according to his contract. In *Furness v. Garrard*, (1 *Campb. N. P. Rep.* 38.) Lord *Ellenborough* said, there had been considerable doubt on this point, and that he had ruled in deference to the authority of Mr. J. *Butler*, (7 *East*, 480, 481, *notes*), but having since conferred with the judges, he considered the correct rule to be, that if there has been no beneficial service, there should be no pay; but if some benefit has been derived, though not to the extent expected, it should go to the amount of the plaintiff's demand, leaving the defendant to his action for *negligence*. In *Fisher v. Smulu*, (1 *Campb. N. P. Rep.* 190.) which was an action by a buyer against the purchaser, to recover damages for the bad quality of the article sold as sound and good, and who had been sued for the price by the seller, and made no defence, but suffered judgment to pass by default, Lord *Ellenborough* said the plaintiff ought to have made his defence in the original action, and given in evidence the bad quality of the article supplied, either in answer to the whole

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case peculiar in its circumstances, and *cannot be considered as establishing any general rule. The verdict must be set aside, and a new trial awarded, with costs, to abide the event of the suit.

New trial granted.

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*WARNER against BOOGE.

Where a party in a suit becomes entitled to costs from the opposite party, for opposing a motion, who (the costs having been taxed) promises to pay the bill, the promise is founded on sufficient consideration, and will support an action.

IN ERROR, on *certiorari* to a justice's Court.

The return, which was very obscure, to the *certiorari* in the case, stated, that the ground of the action of the defendant in error, was a bill of costs for resisting a motion for judgment, as in case of nonsuit, in this Court, in the case of *Booge v. Warner*, taxed by the recorder of *Hudson* at 27 dollars and 6 cents. The return further stated, that the defendant below, the plaintiff in error, undertook and promised to pay the bill, and promised to confess a judgment for the amount. The justice gave judgment for the plaintiff below for 25 dollars.

Per Curiam. The only error alleged as a ground for reversing this judgment, is the want of consideration to support the promise. If the defendant in the Court below was a stranger to the suit in which these costs accrued, the objection would be well taken; but he appears to be a party in the cause, and we must take the promise proved, to have been made in reference to the very bill in question. The return stated, that it was proved that the defendant did undertake and promise to pay the bill. This was an admission that the costs were properly taxed against him, and he being a party in the suit, there was a sufficient consideration to support the promise.

Judgment affirmed.

demand, or in abatement of the damages. That where there is an opportunity to do final and complete justice between the parties, there ought not to be a second, or cross suit. (Et vide *Dickson v. Clifton*, 2 *Wils.* 319. *Brown v. Davis*, *Duffel v. James*, *King v. Barton*, *Cormack v. Gillis*, cited 7 *Term Rep.* 480, 461. and notes, and 1 *Cumpr.* 40. notes. *Becker v. Vrooman*, 13 *Johns. Rep.* 302. *Jones v. Scriven*, 8 *Johns. Rep.* 453. *Grant v. Button*, 14 *Johns. Rep.* 377)

NEW-YORK,
May, 1812.

JACKSON

v.

M'VEY.

Where a person acting in relation to land as executor, and, consistently with his duty as such permits another to enter upon and occupy the land, he or those who claim under him cannot maintain an action of ejectment against such tenant, and his declarations, claiming the land in his own right, are inadmissible in support of the action, as evidence of title; such declarations being evidence only in relation to the possession.

*JACKSON, *ex dem.* BROWN and others, against M'VEY.

THIS was an action of ejectment for the recovery of lands in the town of *Wallkill*, in the county of *Orange*. The cause was tried before Mr. J. Platt, at the *Orange* circuit, in September, 1816.

The lessors of the plaintiff claimed as the children and heirs at law of *William Brown*, deceased, who was the son of *John Brown*, deceased, and produced a deed of quitclaim, in fee, from *John Brown* to *William Brown*, for the premises in question, dated the 13th of February, 1801. A witness on the part of the plaintiff stated that *John Brown*, in his lifetime, claimed the land as owner thereof, as the witness supposed, because he threatened to prosecute any person trespassing on it, and did prosecute some persons; that *Daniel M'Vey*, the father of the defendant, entered on the land about six-and-twenty years before the trial, by permission of *John Brown*, and built a house with his consent, and that he and his family always said that they held the land under *John Brown*. On his cross-examination, the witness stated, that *John Brown* was the executor of *Duncan Brown*, his father; that the witness understood from *John Brown*, that the lands in question had been sold by *Duncan Brown* to *Duncan Dove*, who had given a mortgage to secure the purchase money. The witness further stated, that *John Brown* claimed the land until the mortgage was paid; and if not paid, as the witness supposed, he claimed the land as his own; and that the eldest son of *Duncan Brown* was *Daniel Brown*, who died long before the revolutionary war, leaving a son and several daughters. The counsel for the plaintiff then offered to prove, by other witnesses, that *John Brown*, in his lifetime, both before and after the entry of *M'Vey*, in his conversations with various other persons, claimed the land as absolute owner. This testimony, being objected to, was overruled by the judge. A mortgage from *Duncan Dove* to *Duncan Brown* and his heirs, was produced on the part of the plaintiff. This mortgage was of 200 acres of land, including the premises in question, and was dated the 23d of March, 1753, conditioned for the payment of 80*l.* on the 22d of March following, with interest. No evidence was offered on the part of the defendant.

The judge charged the jury, that if they believed, from the evidence, that *John Brown* entered upon the land as executor of his father, and, as such, permitted the defendant's father to enter, then the lessors of the plaintiff acquired no right to the land by descent, nor by the conveyance from *John Brown*, and they should find for the defendant. But if they believed that *John Brown* leased the land, as proprietor, they should find for the plaintiff. The jury found a verdict for the defendant, which the plaintiff now moved to set aside, and for a new trial.

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W. A. Duer, for the plaintiff. 1. The evidence of the declarations of *J. Brown* was admissible to show with what intent he entered, and in what character he held the possession. The case of *Jackson, ex dem. Youngs, v. Vredenberg*, (1 *Johns. Rep.* 159.) is an authority in point.

2. The verdict was clearly against evidence. (Here the counsel entered into an examination of the testimony given at the trial.)

Betts, contra. If the declarations of *J. Brown* are admitted for any purpose, it must be in proof of the plaintiff's right; and it would follow, from the argument of the plaintiff's counsel, that a party might recover or make out a title on the strength of his own mere assertions. This case is very distinguishable from that of *Jackson v. Vredenberg*. This was a case of adverse possession, and the declarations of the party were connected with marked acts of ownership which showed the character in which she entered. In *Waring v. Warren*, (1 *Johns. Rep.* 339—342.) the Court say, that the declarations of the party are not admissible in evidence, being interested to maintain the possession and support his title.

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2. When evidence is given on both sides, the Court will not grant a new trial on the ground that the verdict is against evidence. The jury were warranted by the evidence *to presume that *J. Brown* entered on the land as executor. (*England v. S'ade*, 4 *Term Rep.* 682. *Hammond v. Wadham*, 6 *Mass. Rep.* 353. *Jackson v. Sternbergh*, 1 *Caines*, 163. *Defonclear v. Shottenkirk*, 3 *Johns. Rep.* 170.)

Duer, in reply, said, there could be no doubt of the general rule, that the declarations of a party were not evidence to support his title. The question left to the jury was not whether *J. Brown* had title, about which there was no doubt, but whether he claimed to be owner, and with what intent, or in what character he entered and held the possession; whether as owner or as executor of *D. Brown*. Evidence of his declarations was offered, not to prove that he had, but that he claimed to have title. If, in leasing the premises to the defendant, *J. Brown* acted as owner, no matter whether he was so or not, the lessors of the plaintiff are entitled to recover. The defendant cannot call in question the validity of the title under which he entered.

Again; *J. Brown* could not have held as executor. It is not a mortgage for years, but in fee, and on the death of *D. Brown*, the legal estate descended to his heirs at law. But admitting that he held as a trustee for the heirs or representatives of *D. Brown*, can the defendant be allowed to avail himself of that fact, as a defence in this suit? If he acted as trustee, the lessors of the plaintiff, if they recovered, would still hold as trustees, and might be compelled by a Court of equity to convey to the *cestuy que trust*, whose rights cannot be impaired by the recovery
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of the plaintiff in this suit. The defendant ought not to be allowed to set up the rights of the *cestuy que trust* as an outstanding title.

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THOMPSON, Ch. J., delivered the opinion of the Court. The plaintiff moves for a new trial on two grounds; 1st. That the verdict was against the weight of evidence; 2d. That the judge improperly excluded evidence offered on the part of the plaintiff.

The lessors of the plaintiff claimed the premises in question as heirs at law of *William Brown*, deceased, who was, the son of *John Brown*; and the question submitted to the jury was, whether the ownership set up by *John Brown* was *in his own right, or as executor of his father, *Duncan Brown*. It appeared in evidence that *Daniel M'Vey*, the defendant's father, went into possession under and with the permission of *John Brown*. The right to recover, as put to the jury, depended on the question, whether *John Brown*, in this transaction, was acting in his own right, or as executor of his father. The jury decided that he was acting in the latter character; and the verdict is supported by the weight of evidence.

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The case was submitted to the jury upon the plaintiff's own evidence: no testimony was offered on the part of the defendant. From the plaintiff's witness it appeared that *John Brown* acknowledged that the lands in question had been sold by *Duncan Brown*, his father, to one *Duncan Dove*, who had given a mortgage to secure the purchase money. This mortgage appears to have been given in the year 1753, to secure the payment of 80*l.* in one year thereafter. It was proved that *John Brown* said he claimed the land until the mortgage was paid: this shows very clearly that he was acting as executor; and this conclusion is much strengthened by the fact that he was not the heir at law of his father. His brother, *Daniel*, was the eldest son, and there is nothing in the case affording any grounds to infer that *John Brown* had acquired any right from his father, except what grew out of his executorship. When all that he has done in relation to the premises is consistent with, and within the scope of, his duty, as executor, it is unreasonable to conclude that he acted in any other capacity, especially as no color for any other claim is shown, independent of his own declarations. These declarations were not admissible as evidence of title: this is the settled doctrine of this Court. In *Jackson v. Shearman*, (6 Johns. Rep. 21.) the Court say that the acknowledgments of a party as to title, are a dangerous species of evidence, and though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title. The proof offered was, that *John Brown* had, in conversation with several persons, both before and after *M'Vey's* entry, claimed the land as absolute owner. These were not declarations made by him

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whilst in possession, and to show the character of his possession, *but declarations as to the title; and as such they were inadmissible. The motion for a new trial must, accordingly, be denied.

Motion refused.

Low against VROOMAN.

Where an ejectment cause was referred by consent of the parties, and the land in question surveyed, it was held that the party succeeding in the cause, who had paid expenses attending the survey, was entitled to recover half of these expenses from the opposite party, there being some evidence of an agreement that they should be borne equally, and such expenses not being admissible in the taxation of the costs in the suit.

Where costs have been, upon taxation, improperly struck out of the bill, the remedy of the party is by appeal from the [* 239] taxation, and not by action against the opposite party, for the charges which were referred

IN ERROR, on certiorari to a justice's Court.

This was an action of *assumpsit* for money paid, laid out and expended, brought by the defendant in error against the plaintiff in error. It appeared that there had been an action of ejectment pending in this Court between the parties, which, by consent, was referred to surveyors, it being a mere question of boundary. On the survey, one *Tenax* attended as a chain-bearer, who sued the plaintiff below for his services, and recovered between eight and nine dollars, for the one half of which this action was brought against the defendant below. The expenses were proved to have been necessary and proper, and that the plaintiff below having succeeded in the ejectment suit, the costs were taxed; but these expenses were struck out of the bill by the taxing officer, and the bill was paid by the defendant below. There was no positive proof that the survey was to be made at the joint expense of the parties, and *Tenax* swore that he considered the plaintiff below as his employer. One of the referees testified, that he inferred from the acts of the parties on the survey, that each was to bear an equal share of the expenses, but he did not recollect to have heard from either any explicit declaration on the subject; that on the survey the referees were boarded part of the time by the plaintiff, and part by the defendant. The justice gave judgment for the plaintiff below.

Per Curiam. The reference to the surveyors was by mutual consent of the parties, and the costs attending the *survey were not such as could be taxed in the bill of costs, without some special agreement on the subject. The evidence on the question, whether the expenses were to be borne mutually by the parties, is rather doubtful, but such a conclusion may very fairly be drawn from the circumstances given in evidence, and it was so understood by one of the surveyors. It was an expense incurred for the mutual benefit of both, and it is just and equitable that each one should bear his proportion. Had this been a charge which might have been taxed against the losing party, and which had been struck out of the bill of costs improperly, the remedy ought to have been by appeal from the taxation; but not being such a charge, there is no remedy, except by ac-

tion. We cannot see that any principle of law has been violated; and the real and substantial justice of the case being in support of the judgment, it must be affirmed.

NEW-YORK,
May, 1818.

IRVINE
v.
COOK

Judgment affirmed. (a)

(a) If no directions are given respecting the costs of an award, they are to be paid by both parties equally. *Grove v. Cox*, 1 Taunt. 163.

IRVINE against COOK.

IN ERROR, on *certiorari* to a justice's Court.

This was an action brought by the defendant in error to recover from the plaintiff in error a balance due to him on the sale of a mare. The defence set up was payment made by the note of one *Crawford*; to repel which, the plaintiff below offered to prove the insolvency of *Crawford*, by what one *Reuben Smith* had said. This testimony was objected to by the defendant below, and the objection was overruled, but the testimony was not admitted to the jury as evidence. A verdict was found for the plaintiff below.

Improper evidence ought not to be allowed to be given in the presence of the jury, although they are, afterwards, directed to disregard it. (a)

**Per Curiam*. The only objection to this return relates to the testimony offered of what *Reuben Smith* had said as to the insolvency of *Crawford*. The hearsay evidence of what *Smith* had said was certainly inadmissible. It was objected to, and the justice says that he overruled the objection: by this he must mean that he received the evidence; but he says that the testimony was not admitted to the jury as evidence. If the return is to be understood, as we think it must, that the justice admitted the evidence to be given to himself, but that he did not allow the jury to consider it as evidence, it was improper. Such a practice would be dangerous in its consequences, as the evidence is given in the presence and hearing of the jury. This point was decided in *Haswell v. Bussing*, (10 Johns. Rep. 128.) The Court say that it would lead to great abuse, if a justice were allowed to admit a witness to testify *de bene esse*, and to say that he afterwards disregarded the evidence. The judgment must, accordingly, be reversed.

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Judgment reversed.

(a) *Penfield v. Carpenter*, 13 Johns. Rep. 330. *Tuttle v. Hunt*, 2 Cowen, 436.

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HERRICK
v.
WHITNEY.

HERRICK *against* WHITNEY and others.

There is a warranty implied in the transfer of every negotiable instrument that it is not forged; therefore, the payee of a note is not a competent witness for the holder, in an action against the maker, although the holder took it at his own risk as to the solvency of the maker; the payee having a direct interest to [* 241]

charge the maker, in order to protect himself against his implied warranty. (L)

THIS was an action of *assumpsit*, on a promissory note, dated March 6th, 1816, payable in six months, to *John Fitch*, or bearer, and executed by the defendants. The cause was tried before Mr. J. Platt, at the *Oncida* circuit.

Fitch was called by the plaintiff as a witness to prove the execution of the note by the defendants, and stated that he transferred the note to one *Cummings* in payment for a pair of horses, but at the risk of *Cummings*, as to the solvency of the makers, and that he had no interest in the suit. The defendants' counsel objected to the competency of the witness; the judge, however, admitted him. A verdict was taken against the defendant, *Whitney*, for the amount of the note, subject to the opinion of the Court, and in favor of the other defendants, who were proved to be infants.

*The case was submitted to the Court without argument.

Per Curiam. The witness was responsible upon an implied warranty that the note was not forged. He, therefore, had a direct interest in establishing the fact which he was called to prove; for, by obtaining a verdict for the plaintiff, on the plea of *non assumpsit*, he protected himself against his own warranty.

Judgment for the defendants. (a)

(a) A forged note is not payment of goods sold, and the seller may treat it as a nullity, and bring his action on the original contract. (*Markle v. Hasfield*, 2 Johns. Rep. 445.) The vendor of a chattel, being liable to the vendee on the implied warranty of title, is not a competent witness in an action against the vendee by a person claiming it. (*Herrmance v. Verney*, 6 Johns. Rep. 5.) For the same reason, the grantor of land, with warranty, express or implied, is inadmissible in support of his grantee's title. (*Jackson and Caldwell v. Hallenback*, 2 Johns. Rep. 394. *Swift v. Dean*, 6 Johns. Rep. 523. *Smith v. Chambers*, 4 Esp. Rep. 161.)

(b) Vide *Barrett v. Snoden*, 5 Wendell's Rep. 181. *Baskins v. Wilson*, 6 Cow. Rep. 471. *Murray v. Judah*, Id. 484. *Shaver v. Ehle*, 15 Johns. Rep. 201. *Williams v. Mathews*, 3 Cow. Rep. 252.

NEW-YORK,
May, 1818.BREED
v.
COOK.BREED *against* COOK AND CADWELL.IN ERROR, on *certiorari* to a justice's Court.

The defendants in error brought an action in the Court below against the plaintiff in error, for part of the price of a horse sold by them to him. The price of the horse was 65 dollars; in part payment for which the defendant below delivered to the plaintiffs a promissory note for 23 dollars, drawn by one *Fillmore*, payable in six months, to the defendant or bearer. When the note became due, *Fillmore* was utterly insolvent.

It was proved, on the part of the defendant below, that at the time of the sale of the horse, the plaintiffs requested him to endorse the note; this he refused to do, and stated that the maker of the note was as well known to the plaintiffs as to him; and that the plaintiffs, after inquiring into the solvency of the maker, finally agreed to take the note without endorsement. The justice decided, that the plaintiffs *below not having made any special contract to take the note at their own risk, the defendant was liable for the amount of it, and rendered judgment accordingly.

Where, on the sale of goods, the vendee delivers to the vendor the promissory note of a third person, which he refuses to endorse, it is to be considered as payment, and the vendor cannot, afterwards, resort to the vendee, unless the note was forged, or there was fraud or misrepresentation on his part

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as to the solvency of the maker.
(a)

Per Curiam. The justice erred. Admitting the rule of law to be as he apprehended, yet he clearly misapplied it; for the evidence in this case showed very satisfactorily that the vendors agreed to take the note at their own risk. The purchaser told them expressly that he would not endorse it, and there is no pretence of fraud. The decision in the case of *Whitbeck v. Van Ness*, (11 *Johns. Rep.* 409.) gives the true rule on this point, which is, that if a vendor of goods receive from the purchaser the note of a third person, at the time of the sale, (such note not being forged, and there being no fraud or misrepresentation on the part of the purchaser, as to the solvency of the maker,) it is deemed to have been accepted by the vendor, in payment and satisfaction, unless the contrary be expressly proved.

Judgment reversed.

(a) *Butler v. Haight*, 8 *Wendell's Rep.* 535. *Ren v. Barker*, 3 *Cow. Rep.* 272. *Mulden v. Whitbeck*, 1 *Id.* 290. *Porter v. Talcott*, *Id.* 359. *Smith v. Rogers*, 17 *Johns. Rep.* 340.

NEW-YORK,
May, 1818.

GILBERT

v.

VANDERPOOL.

Where process is issued out of a justice's Court against an attorney or counsellor, and served during the term of the Court of which he is an attorney or counsellor, the defendant may plead his privilege in [* 243]

abatement, although the process was returnable after the end of the term.

(a) A plea in abatement in a justice's Court need not be verified by affidavit.

GILBERT *against* VANDERPOOL AND BECKMAN.

IN ERROR, on *certiorari* to a justice's Court.

The defendants in error brought an action in the Court below against the plaintiff in error, who was an attorney of this Court. The summons was issued during the term of this Court, and was returnable on a day subsequent to the last day of term. On the return of the summons, the parties appeared, and the defendant pleaded that he was an attorney of the Supreme Court, which was sitting at the time the summons was issued and served, and claimed his exemption under the proviso in the 8th section of the act concerning costs, (1 N. R. L. 345.) (b) which takes away the privilege * of an attorney or counsellor, in cases of debts to the amount of 25 dollars, "unless it shall appear that the Court wherein he shall be such attorney or counsellor shall be then sitting." The justice overruled the plea. A trial was then had on the general issue, and judgment was rendered in favor of the plaintiffs below.

PLATT, J., delivered the opinion of the Court. Two questions are presented for our consideration in this case: 1. Whether the defendant below was entitled to exemption from this suit upon the facts stated in his plea; and, 2. Whether the justice was bound to receive or notice the plea in abatement, without affidavits of its truth.

On the first question, we are of opinion that, according to the true construction of the 8th section of the act concerning costs, an attorney or counsellor of any Court of record is exempt from the service of process issued out of a justice's Court, during the sitting of the Court, of which he is an attorney or counsellor. The term of such Court may continue until the day before the return day of the summons; and then the defendant would have only one, instead of six days, to prepare for his defence; the legal intendment being that the attorney or counsel is occupied exclusively in the business of the term during its continuance. The statute has modified the common law privilege, by subjecting attorneys and counsellors, during vacation, to the jurisdiction of justices; but the effect of the proviso is to leave them completely under the protection of their common law privileges during the terms of their Courts.

On the second question, also, the opinion of the Court is in favor of the defendant below. The 23d section of the act for the amendment of the law, (1 N. R. L. 524.) (c) requiring dilatory pleas to be verified by affidavit, is expressly made applicable to

(a) *Van Alstine v. Dearborn*, 2 *Wendell's Rep* 586.

(b) 2 R. S. 290.

(c) 2 R. S. 352.

Courts of record only. A justice's Court, in the sense of that statute, is not a Court of record. The statute says, "that no dilatory plea shall be received in any Court of record, unless the party offering such plea do, by affidavit, prove the truth thereof, &c." This is said in reference to the practice of all Courts of record of receiving written pleas, in vacation or in term, by filing them in the clerk's office, and has no reference to a justice's Court, where the pleadings are generally *ore tenus*, and are never required to be in writing, and where the pleadings are always in open Court. That a defendant might make an oral plea in abatement, and yet be required to verify it by an affidavit, that is, an oath in writing, was never intended by the legislature. A plea in abatement in a justice's Court, like every other plea, must be proved, unless admitted; and in this case the trial and proof of all disputed facts was immediately to follow the plea. The reason, therefore, for requiring an affidavit to verify a dilatory plea, in Courts of record, does not apply to a justice's Court. In the one case, the effect of a plea in abatement, if frivolous, is to delay a trial on the merits, for a term, at least: in the other case, the plea in abatement, and the plea on *respondeas ouster*, are all tried at the same sitting. Besides, the affidavit (if any were necessary) was waived in this case, as the plaintiffs made no objection to the plea on that ground. The plaintiffs and the justice seem to have put the cause on the single point, that, as the return day of the summons was after the term of the Supreme Court, the attorney was amenable to the justice's Court, although the process was issued and served during the term. On that point the justice erred, and the judgment for the plaintiffs below ought to be reversed.

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HUBBARD
v.
SPENCER.

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Judgment reversed

HUBBARD *against* SPENCER.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action of debt in the Court below against the plaintiff in error, on a judgment rendered by another justice in favor of the former against the latter. *Moss*, who gave the judgment, testified, on the part of the plaintiff below, that *Hubbard*, the defendant below, had been brought before him on a warrant at the suit of *Spencer*, the plaintiff; that the cause was adjourned until the 30th of *Decem-*

Where a cause in a justice's Court, having been adjourned,

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became discontinued, by the non-appearance of the plaintiff at the adjourned day, and more than a month after, a person

who had been authorized by the defendant to appear for him at the adjourned day, and confess judgment, came before the justice, and without the knowledge of the defendant, confessed a judgment for the plaintiff, as of the day to which the cause was adjourned, it was held, that this judgment being void, the defendant might avail himself of the irregularity in an action upon it. (a)

(a) *Relyea v. Ramsay*, 2 *Wendell's Rep.* 602.

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May, 1846.
HUBBARD
v.
SPENCER.

ber, 1815, on which day neither of the parties appeared, nor any person on their behalf; that in *February* next, thereafter, the plaintiff appeared before him as of the day to which the cause had been adjourned; that one *Sherrill* was introduced as a witness, who swore that previous to the 30th of *December* *Hubbard*, the defendant, authorized him to confess a judgment in favor of the plaintiff, at the time to which the cause had been adjourned; that *Sherrill*, on being questioned, said, that he thought his authority to confess the judgment extended to the present time, and that he, therefore, confessed a judgment before the witness for 17 dollars and 88 cents, with costs, and that the witness entered the judgment as of the 30th of *December*, preceding. This was the only testimony given; and it did not appear that the defendant ever had any knowledge of the judgment before *Moss*, until the trial in this cause. The justice who tried this cause gave judgment for *Spencer*, the plaintiff below, for the amount of the judgment before *Moss*, with costs.

PLATT, J., delivered the opinion of the Court. The suit originally instituted before *Moss* was unequivocally discontinued by the non-appearance of the plaintiff in that suit, on the 30th of *December*, 1815; and the parties then stood in the same situation as if it never had existed. According to the testimony of *Moss* himself, the judgment before him was entered *nunc pro tunc*, nearly two months after the discontinuance of the suit; and the only color for that extraordinary proceeding was, that the defendant had authorized his attorney, *Sherrill*, to appear at the adjourned day, and confess a judgment on the suit then pending, coupled with the opinion of *Sherrill*, that a power to confess a judgment at the adjourned day, was sufficient authority to confess a judgment in *February*, after the parties were out of Court, so as to have it entered as of the 30th of *December*, preceding. I think such a proceeding is not to be endured. The foundation of this suit is a judgment against a man who was not in Court, *who was not under process of any kind, and in fact had no notice of the proceeding against him. Although he authorized *Sherrill* to confess a judgment in *December*, *non constat*, but that he had paid the debt, or had a good defence against the claim in *February* following. It is against the first principles of justice to conclude the rights of a person by a proceeding to which he was not privy, and against which he had no opportunity of defending himself.

The only question is, whether we can notice the illegality of that proceeding in this collateral way. In my opinion, there is ground to infer a fraudulent connivance between the plaintiff and *Sherrill*, who confessed the judgment before *Moss*; but I am also of opinion that *Moss* had no jurisdiction when he received the plea of confession, and, therefore, his judgment, *nunc pro tunc*, was void. The justice was limited, by

statute, to a certain course of proceedings; and it would be preposterous to give such a construction to the statute as would authorize what was done in this instance. It must, therefore, be regarded as a proceeding *coram non judice*, and void; and hence it follows that the judgment in this suit has no foundation, and must be reversed.

NEW-YORK
May, 1848.

CANIFF
v.
MYERS.

Judgment reversed.

CANIFF *against* MYERS.

IN ERROR, on *certiorari* to a justice's Court.

The plaintiff in error brought an action in the Court below against the defendant in error, and on the return of the process, one *Barnes* appeared as attorney for the plaintiff. The defendant objected to him, and demanded his authority; on which *Barnes* produced a written power, purporting to be signed and sealed by the plaintiff, and to which the attorney was the only subscribing witness. *Barnes* offered himself as a witness to prove the execution of it, but was objected to by the defendant, and excluded by the justice, who gave judgment of nonsuit, in which he included all the costs on both sides.

Where an attorney appears by authority, in a justice's Court, the attorney is a competent witness to prove the execution of the power in himself. (4)

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Per Curiam. As between the plaintiff and defendant, the attorney was a competent witness to prove the authority to himself to appear as attorney in the suit. He acquired no right to costs in consequence of swearing to the execution of the power, and, therefore, had no interest. The justice also erred in giving judgment against the plaintiff for his own costs.

Judgment reversed. (b)

(a) *Gaul v. Groat*, 1 Cowen, 113. *Tullock v. Cunningham*, Id. 256. *Pisley v. Bette*, 2 Id. 421.

(b) *Vide Timmerman v. Morrison*, 14 Johns. Rep. 369.

NEW-YORK,
May, 1818.

BURDICK

v.

GREEN.

BURDICK against GREEN

To the common counts in *assumpsit*, a plea, that after making the promises in those counts mentioned, the defendant made and delivered to the plaintiff his promissory note for the same identical promises, which the plaintiff received in full satisfaction, and afterwards endorsed and de-
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livered the note to A. B., is bad; for the receiving of a promissory note, and endorsing it to a third person, does not extinguish the original cause of action, provided the payee can show it to be lost, or can produce it on the trial to be cancelled. (u)

A negotiable note does not extinguish an antecedent debt which formed the consideration of it, except *sub modo*.

The endorsement of a promissory note to A. B., or order, for value received, transfers the legal title in the note to the endorsee, which cannot be divested, except by cancelling the endorsement, or endorsing it again.

THIS was an action of *assumpsit*. The declaration contained several counts; 1. On a promissory note, dated the 21st June, 1810, made by the defendant, and payable to the plaintiff, or order, on the 1st of August next, thereafter, for 1525 dollars. 2. The second count, after setting forth the note, stated, that the plaintiff endorsed it to Joel Ketchum, or order, who, on the 31st July, 1816, did, under his hand and seal, transfer, assign, and set over to the plaintiff, the said note, together with all his right, title, and interest therein, by reason whereof the defendant became liable to pay, and being so liable, in consideration thereof, undertook, &c. 3. The common money counts. 4. *Indebitatus assumpsit* for goods sold. 5. A *quantum valedant* on the same.

The defendant pleaded, 1. *Non assumpsit*. 2. *Actio non accrevit infra sex annos*. 3. 4. That the promises mentioned in the declaration were made before the 3d of March, 1812, on which day the defendant was discharged from his debts, as an insolvent, under the act of the 3d of April, 1811. 5. To the first count of the declaration the defendant pleaded, that after the making the promissory note therein mentioned, and before the commencement of this suit, to wit, on the 21st of June, 1810, the plaintiff, in writing, endorsed it to Joel Ketchum, or order, and delivered it to him. 6. To the third, fourth and fifth counts the defendant pleaded, that after the making the several promises in those counts mentioned, to wit, on the 21st of June, 1810, the defendant made his promissory note for the same identical promises, and delivered it to the plaintiff, by which note, for value received, he promised to pay the plaintiff, or order 525 dollars, on the first day of August then next, which note the plaintiff received in full satisfaction of the said promises, and that the plaintiff, afterwards, endorsed and delivered it to Joel Ketchum for value received.

The plaintiff replied, 1. To the second plea, the issuing a *capias ad respondendum* within six years. 2. To the fifth plea, the plaintiff replied the re-assignment from Ketchum of the note. 3. To the sixth plea the plaintiff replied, that after the twenty-first of June, 1810, and before the commencement of this suit, to wit, on the 31st of July, 1816, Ketchum, by his instrument in writing, under his hand and seal, assigned the said note, with all his right, title, and interest therein, to the plaintiff; averring that the note had not been paid; whereby the endorsement to Ketchum became cancelled, and the plaintiff restored to all his rights in the premises, as though the endorsement had not been made. 4. To the third and fourth pleas the plain-

(a) Vide *Booth v. Smith*, 3 *Wendell's Rep.* 66. *Hughes v. Wheeler*, 8 *Cow. Rep.* 77. *Raymond v. Merchant*, 3 *Cowen*, 147. *Supra*, 241, et not.

tiff replied fraud in obtaining the discharge, and concluded to the country.

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The defendant rejoined to the replications to the second and fifth pleas, taking issue thereon, and demurred to the replication to the sixth plea, assigning as special causes of demurrer, 1. That it was a departure from the third, fourth, and fifth counts of the declaration; and, 2. That it does not allege that the assignment was made or endorsed on the note, or that the endorsement made on the note was cancelled. The plaintiff joined in demurrer.

**Cinkin*, in support of the demurrer, contended, that the replication to the sixth plea did not sufficiently answer the material facts stated in the plea. (1 *Chitty*, Pl. 513.) Where a note is given for a precedent debt, it so far operates as an extinguishment, that the party cannot recover on the original consideration, unless he produces and cancels the note, or proves that it has been lost. (*Holmes v. D'Camp*, 1 *Johns. Rep.* 34. *Angel v. Felton*, 8, *Johns. Rep.* 149. *Pintard v. Tackington*, 10 *Johns. Rep.* 104.) By transferring the note, the plaintiff affirmed the fact of its being received in payment. There was a time, then, when the plaintiff had no right of action on the original contract, and that right cannot be revived by the act of the plaintiff merely.

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Z. R. Shepherd, contra, insisted, that as the note had been re-assigned to the plaintiff, he was entitled to bring an action upon it. The plea of the giving a note was merely to defeat the action on the original contract. The plaintiff may strike out the endorsement, or he may produce and cancel the note at the trial.

SPENCER, J., delivered the opinion of the Court. The point is, whether an action of *assumpsit* can be maintained on the original cause of action, under the circumstances set forth in the 6th plea, with the additional fact, that the promissory note duly endorsed to *Ketchum* had been re-assigned to the plaintiff, under the hand and seal of *Ketchum*, by a distinct instrument.

There can be no doubt that the legal title in the note is in *Ketchum*, for the plea states the endorsement of the note under the hand of the plaintiff to *J. Ketchum*, or order, for value received; the transfer was thus complete, and nothing but the cancelling this endorsement, or *Ketchum's* endorsing it again, would divest him of the legal title. A note endorsed in blank may, or may not, be filled up, at the election of the endorser, but an endorsement in full, transfers the interest of the payee to the person named in the endorsement. (*Chitty on Bills*, 116, 117, 118.)

In *Holmes and Drake v. D'Camp*, (1 *Johns. Rep.* 35.) it was held, that though, technically speaking, a negotiable note does

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*not extinguish an antecedent debt which formed its consideration, it was an extinguishment *sub modo*; and, as I understand that case, we adopted this rule, that when it appeared that a negotiable note had been given for a prior debt, that we would not suffer the plaintiff to recover on the original consideration, unless he showed the note to have been lost, or produced and cancelled it at the trial.

The plea in this case, therefore, is defective, as a bar to an action on the original consideration; for we have seen that the mere giving a negotiable note, or its endorsement to a third person, does not extinguish the original cause of action, provided the payee in the note can show it to be lost, or can produce it to be cancelled; and *non constat*, that it cannot be done in this case.

Judgment for the plaintiff.

BARTLETT against CROZIER.

Where a damage is suffered by the act or omission of a public officer, contrary to his duty, the party injured may maintain an action on the case against the officer.

Where an overseer of highways wilfully neglects to repair a bridge within his district, by reason of which the plaintiff's horse falls through, and breaks his leg, an action on the case may be maintained.

It seems that the declaration in such action should allege that the commissioners of the town had provided materials, and that the defendant had the means of making the repairs; but the omission is cured after verdict, by the common law argument, that the defect was supplied on the trial, by proof. (a)

IN ERROR, to the Court of Common Pleas of the county of Washington.

The defendant in error brought an action of trespass on the case, in the Court below, against the plaintiff in error. The declaration contained three counts, which were substantially the same, and stated, that the defendant below was, on the 5th of April, 1814, duly elected an overseer of highways for the town of Salem, in the county of Washington, for district No. 14, in the said town, and took the oath prescribed by law, which was duly filed with the town clerk; that he undertook the execution of his office; and that, not regarding, but neglecting his duty, he negligently and wilfully suffered a certain bridge, in the said district, and on a public highway therein, to be and remain, for the space of three months, broken, dangerous, and unfit to be travelled over, he well knowing the premises; and that, during that time, the plaintiff below was driving his mare over the bridge, and by reason of the defendant's wilful negligence in not repairing, the mare fell through the bridge, and broke her leg, &c.

The defendant below pleaded the general issue; and a verdict having been found on the trial for the plaintiff below, the defendant brought a writ of error, and assigned for error that the declaration was insufficient in law to maintain the action.

(a) The judgment in this case was reversed, and the principles on which it was decided, denied by the Court of Error. 17 Johns. Rep. 439

Crary, for the plaintiff in error, contended, 1. That an action does not lie at common law against the overseers of highways, for not repairing a road or bridge. The town or parish at large is bound to repair, unless, by prescription, the burden is thrown on some particular person, by tenure. (*King v. Sheffield*, 3 *Term Rep.* 106. 111. 1 *Ld. Raym.* 725. 5 *Burr.* 2100. 4 *Burr.* 2510. 3 *Comyn's Dig.* 31. *Chimin*, (B. 2. B. 3.) Where a highway is out of repair, the whole parish is indictable, and if a bridge is out of repair, the whole county are answerable. (2 *Inst.* 700, 701. 5 *Term Rep.* 598. 2 *Bl. Rep.* 655. *Vent.* 183.)

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Again; this action is not maintainable on the statute. (2 *N. H. L.* 270. Sess. 36. ch. 33.) (a) The statute (s. 14.) (b) gives a penalty merely for neglect of duty. The *English* statute is analogous, and creates an officer called a surveyor of highways, with similar powers. (2 *Burr.* 805. 832. 834. 2 *Hawk.* 302. n. 3. 5 *Johns. Rep.* 375. 1 *Johns. Rep.* 54. *Bouton v. Nelson*, 3 *Johns. Rep.* 474. *Freeman v. Cornwall*, 10 *Johns. Rep.* 471.)

The overseers act under the authority and direction of the commissioners of highways. They are to *warn* all persons assessed to work on the highways. (sect. 3.) They cannot compel persons to work. In case of neglect, they can only complain to a justice of the peace, who may issue a warrant to levy the fines. (s. 9.) If this action can be maintained, an overseer might be obliged to repair a road at his own expense.

Again; if an action lies against the overseers for a breach of duty, the plaintiff ought to state, in his declaration, what the duty is, and show how it has been violated. A mere general averment of a breach of duty is not sufficient. It is too general and indefinite. The defendant cannot come prepared to meet it. It is one of the first principles of pleading, as Mr. J. Buller observes, to state facts for the purpose of informing the Court, whose duty it is to declare the law on those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it. (1 *Doug.* 159.) Where the law presumes the affirmative of a fact, the negative must be proved by the party averring it in pleading. (*Williams v. East India Company*, 3 *East*, 192.) And where an act is required to be done by a person, the omission of which would be a criminal neglect of duty, the law presumes the affirmative. So, here, the law will presume the overseer did his duty in this case. The statute prescribes penalties, but gives no action against the overseer. The plaintiff should show that the commissioners made the assessment and delivered the warrant to the overseers, and that they had the means of making the repairs.

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Foot, contra, said, that he did not pretend that an action would lie on the statute, further than what arises from its being made the duty of the overseers of highways to keep the roads and bridges in repair. *Ashurst*, J., in *The King v. Sheffield*, admits, that if it was the duty of any particular person to repair, an action would lie against him. The principle on which this action is brought is this, that where a public officer neglect his duty, by reason whereof a person is injured, an action on the case lies against such officer, at the suit of the party injured by such culpable omission. (3 *Bl. Com.* 123. *Jenner v. Joliffe*, 9 *Johns. Rep.* 381. *Cro. Jac.* 446. 473. 1 *Ld. Raym.* 486 *Co. Litt.* 56. a.)

As to the objection that we have not properly alleged what was the defendant's duty, nor that the commissioner delivered him the assessment list, or directed him to repair this particular bridge, the answer is, that these defects are cured by the verdict. (1 *Chitty's Pl.* 318. 1 *Saund.* 238. n. 1. 1 *Johns. Rep.* 276.)

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In *Townsend v. President and Directors of Susquehannah Turnpike Co.* (6 *Johns. Rep.* 90.) which was an action on the case, for the injury sustained by the plaintiff, by the fall of a bridge on the road, the Court held the action maintainable.

Crary, in reply, said, that in the case of *Townsend v. The Susquehannah Turnpike Company*, the defendants were owners of the highway, and received a toll from the passengers, and were bound, by the act of their incorporation, to keep the road in repair. Here the defendant had no interest in the highway or bridge. It was not his particular duty to keep this bridge in repair, but the whole town, or the occupiers of the adjoining land were bound. The only evidence of any neglect of duty in the defendant is the accident which happened to the plaintiff's horse.

But if the defendant was liable, he could not be made so on this declaration. It should be shown that the plaintiff had power and authority to do the act, the omission of which is made the ground of action. (5 *Comyn's Dig.* 590. *Pleader*, (O.) The overseers have no power but what is derived through the commissioners of highways.

SPENCER, J., delivered the opinion of the Court. This is a writ of error to the Common Pleas of *Washington*; and the error relied on is, that the declaration contains no cause of action. The declaration sets forth, in substance, that *Bartlett* was duly chosen and qualified, according to law, an overseer of highways, for district number fourteen in the town of *Salem*, and took upon him the office; that, disregarding his duty in that behalf, and wholly neglecting the same, he wilfully suffered a certain bridge in said district, and on a public highway there

in, to be and remain, for the space of three months, broken, dangerous, and unfit to be travelled over, he well knowing the premises; and that, during that time, *Crozier* was driving a certain mare, whereof he was possessed, over the said bridge, and by reason of *Bartlett's* wilful negligence, as aforesaid, in not repairing said bridge, the said mare fell through the same, and broke her leg, whereby, &c.

This is the substance of all the counts. To these the defendant pleaded not guilty. The jury found him guilty, and assessed the plaintiff's damages.

*The broad question is, whether a public officer, who wilfully neglects his duty, is responsible to any individual who suffers damage and loss in consequence of that neglect.

A preliminary objection deserves first to be disposed of. It is insisted that it is not averred that the commissioners of the town had done their duty in providing materials for the repair of the bridge, nor taken the steps required of them; and that it is not alleged that the defendant below had the means of making the necessary reparation. It is a settled rule, that if the issue joined be such as necessarily required, on the trial, the proof of facts either imperfectly stated or omitted, and without which it is not to be presumed that the Court would direct, or the jury give the verdict, such defect or omission is cured by the verdict. (1 *Saund.* 228. a.)

The declaration charges a wilful neglect of duty on the part of the overseer, and this presented the very gist of the inquiry; it would not have been a wilful neglect of duty, or any neglect at all, if the default in repairing the bridge could have been attributed to the commissioners, or if the overseer had not the means in his hands to repair it, or if he had been ignorant of the want of repair, unless the ignorance was culpable; and we must now consider it as established by the verdict that there was an omission of duty on the part of the overseer, or else the verdict could not have been given.

There can be no doubt, under the act to regulate highways, that it is the duty of the overseer of highways to repair the bridges within his particular district. (2 *R. L.* 270. § 3. 28.) (a) All, therefore, that has been urged as to the duty to repair roads by the owners of the adjoining land, at common law, is entirely inapplicable.

It is a general principle of law, that wherever an individual has sustained an injury, by the misfeasance or nonfeasance of an officer, who acts, or omits to act, contrary to his duty, the law affords redress by an action on the case adapted to the injury. Lord *Kenyon*, in the case of *Russell v. The Men of Devon*, (2 *Term Rep.* 671.) admits, that an action will lie by an individual for an injury sustained by omitting to repair a road,

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(a) 1 *R. S.* 501. 505.

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against any other individual bound *to repair it, though he did not think the action lay at common law against the county.

Without multiplying references, the principle on which this action rests, was recognized by this Court in the case of *Townsend v. The Susquehannah Turnpike Company*, (6 Johns. Rep. 90.)

That was an action founded on an injury done the plaintiff in the loss of a horse, by reason that one of the bridges of the corporation was so ruinous as to fall, when the plaintiff was crossing it with his horses. The Court held that the action was sustained, on the ground that the corporation was bound to bestow ordinary care in the construction and repair of their bridges.

The duty of the corporation in that case was an implied one, resulting from their ownership of the road, and the reception of toll. In the present case, the duty results from the acceptance of an office, that it shall be well and faithfully executed; and whoever suffers from its unfaithful execution, must have his remedy. It stands on the same principle as actions against ministerial officers for their neglect to execute their offices, to the injury of another; as against a sheriff for not serving a writ, or against an innkeeper for refusing to receive and accommodate a traveller.

Judgment affirmed

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*THOMPSON *against* LOCKWOOD.

Where a sheriff voluntarily permits a defendant in execution to escape, he cannot arrest or detain him, unless the plaintiff in the execution issues a new process; nor can he retain him on his surrender, unless the plaintiff in the execution does some act showing his election to hold him on the old process. (a)

If the sheriff arrest the defendant again on the same execution, and take from him a bond for the gaol liberties, jointly and severally with another person, as his surety, such bond is void for duress, not only as to the defendant, but, also, as to the surety.

One obligee cannot plead that the bond was obtained of his co-obligee by duress.

But this rule does not apply to a bond taken by a sheriff from a defendant whom he has no right to detain in custody; and the co-obligee or surety may avail himself of the defence of duress, in a severable action against him.

IN ERROR, to the Court of Common Pleas of the county of *Orange*.

The defendant in error, who was sheriff of the county of *Orange*, brought an action in the Court below, against the plaintiff in error, as surety in a bond for the gaol liberties.

At the trial, in the *September* term, 1817, of the Court below, the plaintiff below gave in evidence a bond executed to him, as sheriff, by *William Lawrence* and the defendant below, dated *May* 27th, 1816, by which they bound themselves, jointly and severally, in the sum of 424 dollars and 34 cents, with condition that *Lawrence*, being in custody by virtue of two writs of *capias ad satisfaciendum*, should remain a true and faithful prisoner, and should not escape or go without the limits, &c. The writs of *ca. sa.* mentioned in the condition of

(a) *Littlefield v. Brown*, 1 *Wendell's Rep.* 398.

the bond, and the departure of *Lawrence* from the limits, were admitted on the part of the defendant below.

The counsel for the defendant then offered in evidence, under the notice annexed to his plea, in bar of the action, that previous to the execution of the bond, *Lawrence* had been twice arrested by *Van Duzer*, one of the deputies of the plaintiff below, by virtue of the two executions before mentioned; that previous to the third arrest and imprisonment of *Lawrence*, on the day of the date of the bond, he had been twice voluntarily discharged, and permitted to escape, by *Van Duzer*, who had received a compensation for such discharge and permission. The Court ruled that the evidence was insufficient to bar the action, and the jury thereupon found a verdict for the plaintiff below. The defendant tendered a bill of exceptions to the opinion of the Court below, which was removed into this Court by writ of error.

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W. A. Duer, for the plaintiff in error, contended, that the arrest and discharge from imprisonment amounted to a satisfaction of the debt. A voluntary discharge by the sheriff was, as it respects him, a payment; and his power to arrest *was at an end. He could not maintain an action against the prisoner, to recover the money. Although a discharge of the defendant, without the authority or consent of the plaintiff, may not bind him, yet even the plaintiff would be obliged to sue out a new writ, on the ground that the former *ca. sa.* was a nullity, or had not been returned. It is against all legal reason, that one writ can be twice operative, and produce the same effect. By the first arrest, the writ has been obeyed, and has performed its proper function; and after a voluntary discharge, the sheriff cannot arrest a second time. If he does so, he is liable to an action for false imprisonment. The authorities are explicit and conclusive. (*Lansing v. Fleet*, 2 Johns. Cas. 3. *Holmes v. Lansing*, 3 Johns. Cas. 73. *Palmer v. Hatch*, 9 Johns. Rep. 329. *Atkinson v. Matteson*, 2 Term Rep. 172. per *Grose*, J. *Atkinson v. Jameson*, 5 Term Rep. 25. *Barnes*, 373. *Tillman v. Lansing*, 4 Johns. Rep. 45. per *Thompson*, J. *Clarke v. Clement*, 6 Term Rep. 525. *Tanner v. Hague*, 7 Term Rep. 420. *Vigers v. Aldrich*, 4 Burr. 2482. *Jacques v. Withy*, 1 Term Rep. 557. *Wheeler v. Bailey*, 13 Johns. Rep. 366. *Yates v. Van Renssalaer*, 5 Johns. Rep. 364. *Barnes*, 205. *Blackburn v. Stupart*, 2 East, 243.)

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If, then, the sheriff, after a voluntary escape, cannot make a second arrest, there is an end to the question. The bond is void. The sheriff cannot, *colore officii*, take a bond for security for a debt, for which he has already received satisfaction. He cannot in this suit obtain, indirectly, what the law would not allow him to recover directly from the prisoner. As the sheriff must, as preliminary proof to his action, produce the writ under which he acted, the defendant below may show, by way of de-

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fence, that the debt was satisfied, and the sheriff fraudulently exacted the bond.

Betts, contra. The sheriff had the assent of the defendant in the execution to the arrest. He was a party to the bond given for the liberties, and having executed it, with a knowledge of his rights, he must be bound by it. (*Ackly v. Hoskins*, 14 *Johns. Rep.* 374. 376.) The bond is taken for *the indemnity of the sheriff, and to save him harmless. (*Barry v. Mandell*, 10 *Johns. Rep.* 563. *Tillman v. Lansing*, 4 *Johns. Rep.* 45. *M'Elroy v. Mancius*, 13 *Johns. Rep.* 121.) Is not the surety equally bound? Can he avail himself of the circumstance of the prior voluntary escape? It is sufficient that he executed the bond voluntarily, and for a good consideration. The deed imports a sufficient consideration, and is binding, unless shown to be illegal and void. The surety cannot urge that his principal was exempted from the arrest, for he might waive that exemption. (*Leal v. Wigram*, 12 *Johns. Rep.* 88.) Admitting that *Lawrence* might avoid the bond for duress, yet the surety in a bond cannot avail himself of such a ground of defence. (*Huscombe v. Standing*, *Cro. James*, 187. 5 *Comyn's Dig.* 644 *Plead.* (2 W. 19.)

SPENCER, J., delivered the opinion of the Court. This is a writ of error to the Common Pleas of *Orange* county. The defendant here, who was plaintiff below, sued on a joint and several bond, entered into by the plaintiff in error and *William Lawrence*, to the defendant, as sheriff of the county of *Orange*, conditioned that *Lawrence* would remain a true and faithful prisoner on two writs of *ca. sa.* issued out of the Common Pleas of *Orange*, and not escape or go without the limits of the gaol liberties of that county.

We are to intend from the bill of exceptions that the plaintiff below proved every thing necessary to entitle him to recover; the bill of exceptions having been tendered to the opinion of the Court in overruling the defence set up at the trial.

Under a notice to the plea, it was offered to be proved, that *Lawrence* had been twice arrested by a deputy of the sheriff, on the same executions, and had been twice voluntarily discharged and permitted to escape by such deputy, to whom compensation had been made for such permissions to escape before the arrest on the same process, and under which the bond was given: this evidence, being objected to, was overruled.

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The principle now insisted on is, that it was not competent to the sheriff to re-imprison *Lawrence*, after his deputy *had permitted him to escape; and that the bond exacted from *Lawrence* on the third arrest, after his voluntary escape, was taken illegally, and is void.

The case does not show any act of the plaintiff in the executions affirming the arrest of *Lawrence* under them; it cannot,

then, be distinguished from the case of *Lansing v. Fleet*, (2 *Johns. Cas.* 2.) That case was well considered and very ably discussed, and it settles the point, that after a voluntary escape, the sheriff cannot lawfully retake or detain a prisoner, unless the plaintiff in the execution shall issue a new process; nor can he sustain on the surrender of the prisoner himself, unless the plaintiff in the execution does some act showing his election to hold him on the old process. It is useless to review the cases cited in that case, as they are extremely well examined.

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The next point is, whether, if the bond is void as to *Lawrence* on account of duress, *Thompson* can set up that defence. It is clearly settled, that where a person is illegally restrained of his liberty, and, whilst under such restraint, enters into any obligation to the person causing the restraint, it is avoidable for duress of imprisonment. (*Co. Litt.* 253. *Jenk.* 166. 2 *Lut.* 482.)

But it is answered that this bond being joint and several, and *Thompson* being a surety, he cannot avoid the bond for duress as to *Lawrence*; and the case of *Huscombe v. Standing*, (*Cro. Jac.* 187.) has been referred to in support of the position. As a general principle, it cannot be controverted, that if a bond be obtained from *A.* and *B.* by duress against *A.*, *B.* cannot plead the duress against *A.* to invalidate the bond as against him. This, however, is applicable to cases depending on common law principles, and where there is no statutory provision interposed. Sheriffs can take no bond, or other security, in matters relating to the execution of their offices, but only to themselves, and by the name of their office, with such conditions as the law prescribes; and any obligation taken by a sheriff in other form, by color of his office, is declared void. (1 *N. R. L.* 423, 424.) (a) And the act relative to gaol liberties, (1 *N. R. L.* 427.) (b) making it the duty of sheriffs to let prisoners, on civil process, *go at large within the limits of the liberties, on giving security, is a mere modification and extension of the former act. Perhaps, as the bond here taken was in the terms prescribed by the act, it cannot be said to be void, as being taken *colore officii*. But the taking the bond was unlawful, and the condition itself was void. *Lawrence* could not remain a true and faithful prisoner upon executions on which the sheriff had no right or power to detain him. The bond had no more validity than if the sheriff had taken it without any execution in his hands against *Lawrence*: a condition that a man shall not plough his land, or go out of his house, being in restraint of a common right, is void. (*Bac. Abr. Oblig.* E. 3.) Conditions in restraint of trade have been adjudged, repeatedly, to be void; and among other reasons, as against the public good, by depriving the party of his means of livelihood. (*Bacon*, tit. Bond. K.)

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Judgment reversed.

(a) 2 *R. S.* 226.

(b) 2 *R. S.* 433

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In an action by a witness to recover his fees from the party who subpoenaed him, he may give parol evidence that he attended before the Court, and was examined.

BAKER *against* BRILL.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below against the plaintiff in error, for his expenses in going from Dutchess county to New-York, in obedience to a subpoena, issued out of the Mayor's Court of the city of New-York, on the behalf of the defendant below. The service of the subpoena was proved, and the plaintiff below also proved, by parol, that he attended the Court, and was examined as a witness in the cause. The defendant below insisted that these facts could only be proved by producing the record or minutes of the Court, and not by parol proof: the justice, however, overruled the objection, and judgment was rendered for the plaintiff below.

[* 261] * *Per Curiam*. The justice properly admitted parol evidence, and the judgment must be affirmed.

Judgment affirmed.

JACKSON, *ex dem.* VAN ALEN, *against* C. I. HAM.

A., in 1810, conveyed a lot of land to B. for the purpose of qualifying him to be a voter, no consideration being paid, and A. still remaining in possession. An action for a tort was afterwards commenced against B., and during its pendency in 1814, B. reconveyed the lot to A. A judgment was obtained against B., and the lot was sold under execution. Held, in an action of ejectment brought by the purchaser against the tenant in possession, that the reconveyance, not being made to defraud creditors, was not void by the statute of frauds; nor could it be avoided by the purchaser under the execution, although a purchaser for valuable consideration; for those voluntary deeds which the statute avoids are to a subsequent purchaser, must have been made with intent to deceive, the evidence of which is the voluntary conveyance, coupled with a subsequent agreement to sell, which cannot be the case where the purchase is made, not of the party, but through the intervention of the law (a)

THIS was an action of ejectment, which was tried before Mr J. Van Ness, at the Columbia circuit, in 1816.

The plaintiff's lessor claimed as purchaser under an execution against Wendell C. Ham, and gave in evidence a judgment in an action for a tort in favor of D. Van Alen, against W. C. Ham, for 1019 dollars and 20 cents, docketed on the 1st of November, 1815, an execution issued thereon, tested in October, 1815, and returnable in January term, 1816, and a deed from one of the deputies of the sheriff of Columbia to the lessor of the plaintiff, dated March 11th, 1816. The defendant was in possession of the premises contained in the deed. It appeared that the defendant, in the spring of 1810, gave his son, Wendell C. Ham, a deed for part of the land contained in the sheriff's deed, expressed to be for the consideration of 250 dollars, no part of which, however, was paid; and the intent of the conveyance was to qualify his son to be an elector in that year. On the 9th of July, 1814, W. C. Ham reconveyed to the defendant, by

(a) Vide *Jackson v. Seward*, 5 Cow. Rep. 67. *Jackson v. Finch*, 4 Cow. Rep. 539

deed of that date, in which the consideration was stated to be 250 dollars. The reconveyance was subsequent to the commencement of the suit in which the execution issued.

A verdict was taken for the plaintiff, subject to the opinion of the Court on a case containing the facts above stated.

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**Van Buren*, (attorney-general,) for the plaintiff, contended, that the deed of *W. C. Ham* to the defendant was a mere voluntary conveyance, and was fraudulent and void as against creditors and *bona fide* purchasers. He cited *Verplank v. Sterry*, 13 *Johns. Rep.* 536, in error, *S. C.* 1 *Johns. Ch. Rep.* 261. 268. *Doc. ex dem. Otteley, v. Manning*, 9 *East Rep.* 59—71.

E. Williams, contra, insisted, that this was not a voluntary conveyance; that the deed expressed a consideration of 250 dollars, acknowledged to have been received by the grantor, and which had not been disproved. The defendant ought to have shown, satisfactorily, that it was a mere voluntary conveyance.

SPENCER, J., delivered the opinion of the Court. The lessor of the plaintiff claims as a purchaser under a sale made by the sheriff of *Columbia* county, upon an execution founded on a judgment, docketed the 1st of *Nov.* 1815, against *Wendell C. Ham*; and it appears that the defendant, in *April*, 1810, gave a deed to *Wendell* for about 20 acres of his farm, for the nominal consideration of 250 dollars, but which was not paid, to make him an elector. The defendant produced a deed from *Wendell* to him, dated in *July*, 1814, reconveying the same land for the expressed consideration of 250 dollars. The judgment against *Wendell* was for a tort, and the suit was commenced prior to the reconveyance.

The point is, whether the reconveyance by *Wendell* to the defendant was fraudulent and void as against the purchaser at the sheriff's sale.

I cannot consider the deed of 1814 as a fraudulent or voluntary deed within the purview of the statute for the prevention of frauds; nor, under the circumstances of this case, can I consider the lessor of the plaintiff as entitled to make the objection that it is either a fraudulent or voluntary deed.

It certainly was not made to defraud creditors; for there was no debt in existence when it was given. It was not made with the intent to defraud *David Van Alen* of any lawful action, but must be considered as the mere reconveyance of an estate conveyed for temporary purposes, and intended and expected to be reconveyed. This is to be inferred from the fact that no consideration was paid by *Wendell* to his father, and from the fact, also, that the father continued in possession.

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The first deed may be said to have been a fraud on the elec-

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tion law; but, as between the parties, it was a valid deed. In considering whether the reconveyance was fraudulent, we have a right to regard the prior deed, which we find to have been entirely gratuitous; and even if it be admitted that no consideration was given for the reconveyance, yet, inasmuch as possession was never taken under the first deed, and, consequently, *Wendell* never acquired any false credit from it, no one was deceived by it.

The lessor of the plaintiff, though certainly a purchaser for valuable consideration, could not but know that he was buying contested property, which he took for better and for worse; and we have a right to say, that he knew that the deed from the defendant to *Wendell* was merely for the purpose of making him an elector, and that it had been given up. Those voluntary deeds which may be avoided by a subsequent purchaser under the 27 *Eliz.* ch. 4. are such as are made with intent to deceive such purchaser; and this intent to deceive is evidenced by a voluntary conveyance, coupled with a subsequent agreement to sell again; and it is not merely the accomplishment of the deceit on the purchaser which constitutes the fraud, but the deceitful intention in the seller manifested by his proceeding to the second sale. (*Roberts on Fraudulent Convey.* 35. and the cases there cited.) Here the seller is passive, and the lessor of the plaintiff is not a purchaser from him, but through the intervention of the law.

Judgment for the defendant.

[* 264] *JACKSON, *ex dem.* GILLET and others, against BROWN.

A conveyance by an *Oncida* Indian, in 1791, being previous to the act of the 4th of April, 1801, (see the act relative to the Indians within this state, passed 10th of April, 1813. Sess. 36.

c. 92. 2 *N. L.* 158.) of land of which he was seised in his individual capacity, and distinct from his tribe, as the heir of an Indian to whom it was granted by the state, for his services during the revolutionary war, is valid, (*S. P. Jackson v. Sharpe*, 14 *Johns. Rep.* 472.) although made without special authority from the legislature, and without the approbation of the surveyor-general. (a)

The approbation of the surveyor-general to the deed of an Indian patentee, or his heirs, in pursuance of the 55th section of the act, (sess. 36. c. 92. 2 *N. R. L.* 172.) to a deed that is void and inoperative, does not preclude him from afterwards giving his assent to a valid and operative deed from the same grantor for the same land.

The endorsement of his approbation on the deed needs not state his reasons for giving it. "I approve of the within deed," is sufficient.

(a) *Vide contra Goodell v. Jackson*, 20 *Johns. Rep.* 693. See, also, *S. C.* below, 20 *Johns. Rep.* 188 *Lee v. Glover*, 8 *Coven*, 189.

gained, sold, and released the premises in question, and all action and actions in relation thereto, to the defendant and his heirs. The cause was tried before Mr. J. *Spencer*, at the *Seneca* circuit, in *June*, 1817.

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Letters patent for lots No. 4 and 16, in the town of *Junius*, were, on the 29th of *January*, 1791, issued to *Honyost Tewahangarahkan*, an *Oneida* Indian, and a lieutenant in the line of this state, who was killed in 1779, for his services in the revolutionary war. *Honyost* left two sons, *Honyost*, and the lessor *David*, who is an *Oneida* Indian, residing with the *Oneida* tribe. On the 31st of *December*, 1791, *Elizabeth* and *Honyost*, the widow and one of the sons and heirs of *Honyost*, the patentee, by deed, without authority from the legislature, or the approbation of the surveyor-general, conveyed the two lots No. 4 and 16, in consideration of ten pounds, to *Cornelius A. Van Slyck*, who, in *December*, 1792, conveyed to *J. Atkinson*, who, afterwards, conveyed the same to *James Fisk*. *Fisk*, in *March*, 1808, conveyed the premises in question to *Cass*, who, on the 9th of *July*, 1811, conveyed the same to the defendant. On the 1st of *August*, 1792, one *Honyost Tewahangarahkan*, a *Cayuga* Indian, who was admitted to have no interest, conveyed the two lots to *P. Campbell*, who, in *October*, 1797, conveyed the same to *D. Matthews*. The defendant and those under whom he *claims had been in possession of the premises, claiming title, since the year 1803. By indenture, dated *May* 26th, 1809, *Honyost* and *David*, the sons and heirs of the patentee, in consideration of 2,000 dollars, granted the two lots, Nos. 4 and 16, to the lessor *Gillet*, in fee. On this deed was endorsed the certificate of the surveyor-general, that it appeared to him that it had been fairly obtained; that the consideration was competent, and had been sufficiently secured, in consequence of which he endorsed his approbation. By indenture, dated the 25th of *July*, 1816, the lessor *David*, reciting that he claimed an undivided moiety in lot No. 16, in consideration of 80 dollars, released to the defendant and several other persons, being in possession, and their heirs, all his interest therein, and also released all actions and demands in relation to the same. This was the release mentioned in the defendant's plea, *puis darrein continuance*. The surveyor-general's approbation was endorsed in these words:—"Surveyor-general's office, *Albany*, *July* 27th, 1816. I approve of the within deed. *Simoon De Witt*, surveyor-general." To show that the consideration mentioned in the release was incompetent it was proved, on the part of the plaintiff, that the lot, at the time of the execution of it, was worth 12,000 dollars.

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A verdict was taken, by consent, for the plaintiff, subject to the opinion of the Court, on a case containing the facts above stated.

The case was argued by *Sill* and *Brown*, for the plaintiff, and *Cady*, for the defendant

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SPENCER, J., delivered the opinion of the Court. **The** lessors of the plaintiff claim a right to recover one half of the lands in the defendant's possession, either under the deed from *David*, the Indian, as one of the two heirs of his father, to *Gillet*, of the 25th of May, 1809, or else upon the demise of *David*.

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Since the case of *Jackson v. Sharp*, (14 *Johns. Rep.* 472.) there can be no doubt that the deed of the 31st of December, 1791, from the widow and one of the sons of the patentee, is a valid deed; but if it were not, the defendant, or those under whom he claims, entered on the premises in 1803, under claim and color of title; and, consequently, the conveyance to *Gillet*, in 1809, was void and inoperative.

The right to recover on the demise of *David* will depend on the right of the surveyor-general to give his assent and approbation on the release of the 25th of July, 1816, to the defendant and several others.

The objections to this deed are, 1st. That the surveyor-general, having given his approbation to the deed from *David* to *Gillet*, his power was exhausted, and he could not give his approbation to any other deed from the same Indian for the same land; and, 2d. That the approbation is informal and defective.

By the 55th section of the act relative to the different tribes and nations of Indians within this state, passed 10th of April, 1813, (2 *N. R. L.* 158.) (a) the heirs of the Indians to whom land was granted for military services in the revolutionary war, were rendered capable of taking and holding by descent; and every conveyance thereafter to be executed by the patentee, or his heirs, to any citizen of the state, for any such land, was declared to be valid, if executed with the approbation of the surveyor-general, to be expressed by an endorsement on such conveyance, and signed by him.

By an act of the 2d of March, 1810, the surveyor-general was authorized to ascertain whether legal conveyances made by an Indian patentee of lands granted for military services in the revolutionary war, or their heirs, had been obtained fairly, for a competent consideration paid, or property secured, to be paid to the grantors, before he endorsed his approbation, in pursuance of the act for the relief of the heirs of the *Oneida* Indians.

If the deed to *Gillet* was void for maintenance, in consequence of an adverse possession, it would seem to me that the approbation of the surveyor-general would follow the fate of the principal or subject matter, and that it would be a void execution of the power intrusted to him. His assent being given to a deed that could have no effect or operation in law, was not an execution of the power vested in him, and could not preclude his approving of a valid deed. Indeed, the act of

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(a) 1 *R. N.* 720.

1810, which confers the authority on the surveyor-general of approbating deeds given by Indian patentees, or their heirs, restricts the approbation to legal deeds; the deed, then, to *Gillet* not being legal, the approbation on that ground was void, and being void, it is a nullity.

The second point is untenable. The act of the 13th of April, 1813, requires only the approbation of the surveyor-general to be expressed by an endorsement on the conveyance; he is not required to set forth the reasons or inducements to such approbation, and the one given in this case is a compliance with the act.

Judgment for the defendant.

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v.
BIRDSALL.

SEELEY against BIRDSALL.

THIS was an action on the case against the defendant, late sheriff of the county of *Seneca*, for a false return on a writ of *feri facias*, issued out of this Court, at the suit of the plaintiff, against *W. I. Seeley*. The cause was tried before Mr. J. Spencer, at the circuit in *Cayuga* county, where the venue was laid, in June, 1817.

The plaintiff recovered a judgment against *W. I. Seeley* for 3,933 dollars of debt, and 14 dollars and 43 cents damages and costs. A *feri facias* was issued thereon, to which the defendant returned, that he had sold all the goods and chattels of *W. I. Seeley* to be found in his bailiwick, and that he had made out of the same the sum of 10 dollars and 25 cents, and that he had advertised for sale all his right and title to a certain lot of land. It was proved that one of the defendant's deputies had levied on property of *W. I. Seeley*, to the amount of three or four hundred dollars; that the defendant recognized the levy; and that being requested by the plaintiff to sell, he refused, and never had sold the property levied on.

The defendant's counsel moved that the Court would charge the jury to find a verdict for the defendant, because the plaintiff had not proved any act done by the defendant in the county of *Cayuga*. The judge, however, charged the jury to find a verdict for the plaintiff, subject to the opinion of this Court, and they, accordingly, found for the plaintiff.

Sill, for the plaintiff. The defendant claims a privilege, or exception, which is to be taken strictly. The act (1 N. R. L. 155.) (a) requires the fact, or cause of action, to be proved to

abuses the confidence which the law reposes in him, these are cases to which the statute applies.

An action on the case against a sheriff for a false return, is within the provisions of the act for the more easy pleading in certain suits, (March 21, 1801, sess. 24. c. 47. s. 4. 1 N. R. L. 155.) and the plaintiff is bound to show that the cause of action arose within the county where he has laid his venue.

There is a

* 268 | distinction between acts done *colore officii* and *virtute officii*; in the former case, the act being of such a nature that his office gives him no authority to do it, the sheriff is not protected by the statute; but where, in doing an act within the limits of his authority, he exercises his authority improperly, or

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have arisen in the county where the venue is laid. What is the fact, or cause of action, in this case? The return of the writ. From the nature of the act of making the return, it is impossible to prove where it was made. It is a private act, and not within the intent of the statute. If it is necessary to show where it was done, the Court will intend that it was done in the county where the venue is laid. All presumption is against privilege; and in support of justice the Court will presume in favor of the plaintiff, and throw the proof of the contrary on the defendant. In *Bogert v. Hildreth*, (1 *Caines*, 1.) a mere transitory action was held not to be within the county. In *Storm v. Woods*, (11 *Johns. Rep.* 116.) which was an action for a false return against the sheriff of *Washington*, the cause was tried at *Albany*. There are numerous cases of actions for escapes, in which this objection was never made. (2 *Caines*, 46. 4 *Johns. Rep.* 45. 469.) The action for a false return is transitory, as the sheriff may make and deliver his return any where. (*Griffith v. Walker*, 1 *Wils. Rep.* 336.)

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Cady, contra. The privilege granted is not for the mere personal benefit of the sheriff, but for the sake of public convenience; as, otherwise, a sheriff might be called out of his county into every county in the state, to defend suits against him, to the great injury of the public business intrusted *to his charge. Since the statute of 21 *James I.* ch. 12, which, except that *sheriffs* are not named in it, is similar to our act, actions against *officers*, which would otherwise be transitory, are regarded as *local*.

In *Lord v. Francis*, (12 *Mod.* 403. *S. P. Anon.* 515.) it was held that an action for a false return was local, and the venue might be laid either in the county where the return was made or in that in which it appeared of record. (1 *Comyns, Dig.* 164, 165. 168. *Action.* (N. 8.) (N. 11.) Such was the law before the statute which has made no further change than to confine the action to the place where the act was done, instead of its being, also, laid in the place where the record is kept. The cases in this Court, which have been cited, were actions of debt, not actions on the case. At any rate, the venue should be laid in the county in which the sheriff resides, for there it must be presumed that he does all his official acts.

Per Curiam. An action on the case against a sheriff for a false return on an execution, is within the first section of the statute, (1 *R. L.* 155.) (a) "for the more easy pleading in certain suits;" and, consequently, the burthen of the proof, that the cause of action arose within the county wherein the venue is laid, is thrown on the plaintiff, and the failure to give that proof entitled the defendant to a verdict of not guilty.

(a) 2 *R. S.* 353.

The words of the statute are very plain and perspicuous. If any action upon the case be brought against any sheriff, &c., for or concerning any matter or thing by him done, by virtue of his office, the said action shall be laid within the county where the trespass or fact be done and committed, and not elsewhere; and if, upon the trial, the plaintiff shall not prove that the cause of his action arose within the county wherein such action is laid, in every such case, the jury which shall try the same shall find the defendant not guilty, &c.

The case of *Griffith v. Walker*, (1 Wils. 336.) which considers an action against a sheriff for a false return as transitory, was prior to the statute rendering actions against sheriffs for acts done by virtue of their offices local. The true distinction is between an act done *colore officii* and *virtute officii*: in the former case, the sheriff is not protected by the statute, where the act is of such a nature that his office gives him no authority to do it; but where, in doing an act within the limits of his authority, he exercises that authority improperly, or abuses the confidence which the law reposes in him, to such cases the statute extends.

New trial granted.

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SKILDING and HAIGHT *against* WARREN.

THIS was an action of *assumpsit*, brought by the plaintiffs, as endorsees of a promissory note, dated May 23d, 1815, for 500 dollars, payable in six months, to *Moses Warren*, the defendant, made by *Gilchrist* and *Warren*, and endorsed by the defendant, *Moses Warren*, and by *Benjamin Smith*.

At the trial before Mr. J. Spencer, at the *Rensselaer* circuit, in December, 1817, the counsel for the defendant admitted all the facts requisite, in the first instance, to support the plaintiff's action, and then offered *Jonathan Warren*, one of the makers of the note, as a witness in relation to the origin and transfer of it. He was objected to by the counsel for the plaintiffs on the ground that a party to a negotiable instrument is an incompetent witness to impeach it: but the objection was overruled, and the witness admitted, who stated the following circum-

A note was endorsed by the defendant for the accommodation of the makers, who were then in good credit. Before negotiating the note, they became insolvent, and the defendant then directed them not to part with it, which they promised. They afterwards passed it to the plaintiffs, with full notice of all the circumstances, in satisfaction of a debt due from them to the plaintiffs, which covered part of the amount of the note, receiving from the plaintiffs the balance in cash. The plaintiffs brought an action on the note against the endorser. Held, that the plaintiffs were not *bona fide* holders of the note, and could not, under the circumstances, support the action; and that as the defence rested on matters arising subsequent to the execution of the note, one of the makers of it was a competent witness to defeat the recovery; and that without a release, he being indifferent between the parties. (a)

A party to a negotiable instrument is inadmissible, as a witness, to show it void at the time of its execution; but he is competent to testify as to facts subsequently arising.

(a) Vide *Wardell v. Hughes*, 3 *Wendell's Rep.* 418. *Powell v. Waters*, 8 *Conn. Rep.* 669. *Williams v. Mathews*, 3 *Conn. Rep.* 252. *Powell v. Waters*, 17 *Johns. Rep.* 176. *M'Fadden v. Maxwell*, *Id.* 182. *Sturford v. Rice*, 5 *Cowen* 23. *Utica Bank v. Hillard*, *Id.* 153.

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stances:—The note in question was an accommodation note, endorsed by the defendant, without consideration, to enable the makers, who were partners in trade at *Troy*, to pay their debts, and carry on their business. They expected to be able to obtain the money from one *Wiswall*, who not being at home when the *note was made, which was in the latter part of *April*, or the beginning of *May*, 1815, the date of it was left blank, and the makers had permission to fill it up whenever they should obtain the money. Disappointed in procuring it from *Wiswall*, and in want of money, they filled up the date on the 23d of *May*, and procured the endorsement of *Smith*, and endeavored to negotiate the note, but were unsuccessful. In the latter part of *June*, *Gilchrist* and *Warren*, who had, until then, been in good credit, failed, and became insolvent; and soon after, the defendant inquired of *J. Warren*, the witness, what had been done with the note, and being told that it was still in their possession, expressed his satisfaction, and directed them not to part with it, which the witness promised. *Gilchrist* and *Warren* were indebted to the plaintiffs in about 250 dollars, 70 dollars of which were borrowed money, and the residue was on a note not then due; and soon after their failure, the plaintiff *Haight* called on them for payment of the 70 dollars, which they said they were unable to pay. *Haight* then proposed taking the note in question, and after deducting the amount of the account of the plaintiffs, to pay them the balance. The witness told *Haight* that they could not part with the note, and stated to him that the note was endorsed by the defendant, without consideration, for their accommodation, when they were in good credit; that, since their failure, the defendant had directed them not to part with it, which they had promised, and that they were insolvent, and unable to pay the note, or to indemnify the defendant. Upon this, *Haight* proposed not only to pay the balance of 250 dollars, but to wait two years for the payment of the note, and also to sign a letter of license, giving them two years for the payment of their debts, and to exert the influence of the plaintiffs with their other creditors to obtain their signatures to the same; and if they could not pay the note at the end of two years, to give them further indulgence, if there was a prospect of their being able to pay it within a reasonable time. Two or three conferences subsequently took place, in relation to the subject, and finally, about the third of *July*, *Gilchrist* and *Warren* delivered the note to the plaintiffs, who, a few days after, paid them the balance. The witness understood the agreement of the plaintiffs *to wait for payment, to extend to the endorsers of the note.

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Upon this evidence, the jury, in conformity to the charge of the judge, found a verdict for the defendant, which the plaintiffs now moved to set aside, and for a new trial.

Huntington, for the plaintiffs, contended, that *Warren* was an incompetent witness; that no person whose name is on a nego-

riable instrument is competent to prove it void in its inception ; or, at the time he put his name on it, and gave it currency. (*Mann v. Swan*, 14 *Johns. Rep.* 270. *Walton v. Shelly*, 1 *Term Rep.* 296. *Winton v. Sandler*, 3 *Johns. Cas.* 184. *Baker v. Arnold*, 1 *Caines's Rep.* 258. *Stille v. Lynch*, 2 *Dallas*, 194. *Jordain v. Lasbroke*, 7 *Term Rep.* 601. *Bent v. Baker*, 3 *Term Rep.* 31. *Peake's Cas.* 40. 118. 1 *Exp. Rep.* 298.) The date of the note, in this case, was immaterial. It took effect only from its delivery, (*Lansing v. Gaine & Ten Eyck*, 2 *Johns. Rep.* 300. 3 *Exp. N. P. Rep.* 103.) or from the time of its transfer. by endorsement to the plaintiffs. Though made and executed, it had no legal existence until it was endorsed ; and the witness was called to prove a fact which destroyed the note to which he had given currency, and was, therefore, inadmissible, on the ground of interest.

This case is distinguishable from that of *Woodhull v. Holmes*, (10 *Johns. Rep.* 231.) There the note was drawn and delivered to the payee, and by him endorsed to a third person, for a particular purpose, who fraudulently put it in the hands of a broker. (1 *Day's Rep.* 17. 3 *Mass. Rep.* 27. 355. 4 *Mass. Rep.* 156. 6 *Mass. Rep.* 449.)

Sutherland, contra. The only objection at the trial was, that *Warren* was an incompetent witness, because his name was on the note, not on the ground of interest.

The general doctrine of the case of *Walton v. Shelly* has not been considered as law in *England*, since the case of *Jordain v. Lasbroke*, and the judges there, at *N. P.*, have uniformly received persons whose names were on negotiable paper, to impeach it, unless interested. (*Jones v. Brooke*, 4 *Taunt. Rep.* 464. 1 *Exp. Rep.* 176. *Peake's Rep.* 117. 5 *Exp. Rep.* 119. 13 *East*, 175. *Phillips's Ev.* 32, 33.) *The principle of the case of *Walton v. Shelly* has, it is true, been adopted in this Court, and in the Supreme Court of *Massachusetts*, but with some qualification. Though the party to a negotiable instrument is incompetent to prove it void in its inception, yet for any other purpose, as to prove facts subsequent to making the instrument, he may be a witness, if not interested. The rule in *Walton v. Shelly* is founded in public policy, and it is against public policy to give currency to instruments executed *mala fide*, or in violation of law. All the cases, except that of *Stille v. Lynch*, (2 *Dall.* 194.) in which the principle has been applied, arose out of gaming or usury.

In *Jackson, ex dem. Mapes, v. Frost*, 6 *Johns. Rep.* 135. the grantor of a deed was admitted as a witness to prove it fraudulent, his interest having been released. In *Hill v. Peyson*, (3 *Mass. Rep.* 559.) the Supreme Court of *Massachusetts* held, that the grantee of a deed was a competent witness to prove it fraudulent. So, in *Baring v. Shippen*, (2 *Binney's Rep.* 151.) the assignee of a bond was admitted a witness to prove that

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it was fraudulently obtained by him. In an action of debt on the statute against bribery, the party bribed is a competent witness to prove it. (*Sayer*, 289. *Cowp.* 197.) The guilt of the witness is no objection to his competency, but goes only to his credit. (*Phillips's Law of Ev.* 33.) Accomplices are competent witnesses. The doctrine of the case of *Walton v. Shelly* is strictly confined to negotiable paper, and the reason of it is founded in commercial policy.

The proof offered must be such as goes to show the note void in its inception, or original creation, and to destroy it totally. The case of *Woodhull v. Holmes*, (10 *Johns. Rep.* 231.) is analogous and in point. (6 *Mass. Rep.* 430. 7 *Mass. Rep.* 470.) A party to a negotiable paper, it was there held, may be a witness to prove facts subsequent to its creation, and which go to show that the holder has no right to recover.

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SPENCER, J., delivered the opinion of the Court. It cannot be useful or necessary to review all the cases, upon the question whether a party whose name is on a negotiable *paper, can be admitted as a witness to impeach it, by testifying to facts arising subsequent to the execution of the note.

We have decided, that, from principles of public policy, a man whose name is on such paper cannot be admitted to show it void for usury, or for any other cause, at the time of its execution; but that, as to facts subsequently arising, he may be admitted to testify, if he stands disinterested. I cannot perceive any essential difference between this case and that of *Woodhull v. Holmes*, (10 *Johns. Rep.* 231.) It was decided in that case, that the endorser was a competent witness to prove, that after the note was made and endorsed, it was delivered to a third person, to be presented to a bank for discount, who, instead of offering it, fraudulently put it into the hands of a broker. The evidence of the endorser, in that case, had he made out the facts, would have defeated a recovery, unless the holder had shown that he came fairly by the note. The evidence went to show that the note was an accommodation note; that no consideration had passed between the immediate parties to it, and that the plaintiff had come unfairly into the possession of the note; and this, the Court held, the endorser might prove, notwithstanding the rule in *Winton v. Sailler*, and *Walton v. Shelly*.

The facts proved by the endorser in this case, make out a case precisely similar in principle to that of *Woodhull v. Holmes*. Here the note was endorsed by the defendant, as an accommodation note, to enable the maker to borrow money. No value was received, and the act of endorsing was gratuitous. The makers of the note were solvent when the defendant lent his endorsement; they had become insolvent when the plaintiffs received the note. After the insolvency of the makers, they had promised the defendant not to negotiate the note. With a knowledge of these facts, and to secure about 250 dollars due 216

the plaintiffs, they took this note, in a manner entirely out of the usual course of business. They held out, to the makers of the note, encouragement to aid them in getting a letter of license from their creditors; they advanced a part of the money, and promised to wait two years before payment was exacted. *It cannot be doubted that the plaintiffs are *mala fide* holders of the note, and that they took it with a view to charge a person, who, from mere motives of friendship, had endorsed it to aid men who were in good circumstances, but who had become insolvent. The plaintiffs were warned that the note was *functus officio*, and yet they took it.

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It was strenuously contended at the trial, and on the argument of the case, that the facts to which the endorser testified, were not facts arising subsequent to the execution of the note, but facts contemporaneous with the note, on this ground, that the note had no legal efficacy until it was endorsed.

The same objection existed to the testimony of the endorser, in the case of *Woodhull v. Holmes*; for there the note was not efficacious until it came into the hands of a *bona fide* holder; for as between the immediate parties, there was no liability to each other until then; and yet the testimony of the endorser was admitted as to the facts subsequent to the making of the note; and by the terms, execution of the note, the Court meant its signature.

I repeat it, there is no difference in principle between this case and that of *Woodhull v. Holmes*.

A point has been taken, that *Jonathan Warren*, the maker, was interested, and ought to have been released: it has been decisively answered, that the only objection made to his admission at the trial was the one already considered, and it may be added that he stood indifferent between the parties.

The other points subjoined to the case were not urged on the argument, and are not tenable.

Motion denied. (a)

(a) Vide *Bank of Rutland v. Bach*, 5 *Wendell's Rep.* 66.

*CHEEVER against SMITH, PARDEE and others.

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THIS was an action of debt on a bond for the performance of the covenants contained in articles of agreement; and the only question in dispute was, whether the defendants were to be charged with the sum of 5,000 dollars, mentioned in the

If a man deals with another's agent, and by mistake gives the agent a receipt for a sum of money, which

the agent had a right to pay, and on the faith of that receipt, the principal settles with the agent, and pays him money, the party giving the receipt is concluded from looking to the principal, for he should have given him notice of the mistake in the first instance; and his only remedy is against the agent.

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receipt of the 29th of *October*, 1814, given by the defendants, *Smith* and *Pardee*, to *Nathaniel Allen*, the agent of the plaintiff.

Smith and *Pardee*, two of the defendants, the others being their sureties, contracted with *Cheever*, to supply the forces on the northern frontier, during the late war, with beef. Funds were placed by the plaintiff in the hands of *N. Allen*, to be advanced to *Smith* and *Pardee*, as occasion should require. *Allen*, and *Smith* and *Pardee*, settled their accounts every month, when receipts in full were given, and the balance carried to the next month's account. In *November*, 1814, *Smith* stated to *Allen* and his clerk, that he had been charged with 5,000 dollars, in the *October* preceding, more than he had received. They denied that any mistake had been made. *Smith* continued to sign receipts in full on every monthly settlement, but still urged the adjustment of the alleged mistake. The plaintiffs and *Allen* settled their accounts on the 11th of *July*, 1815, when there appeared to be due to *Allen* a balance of 4,156 dollars and 6 cents, allowing him the 5,000 dollars in dispute. This balance the plaintiff paid to *Allen*. The plaintiff had not been on the northern frontier between the time of the alleged mistake and his settlement with *Allen*.

The above facts having been admitted, or proved on the trial, the defendants then offered to prove that they were charged by *Allen*, on the 29th of *October*, 1814, with the sum of 10,000 dollars, when he had, in fact, paid them but 5,000 dollars. The testimony was objected to on the part of the plaintiff, on the ground that no notice of the alleged mistake had been given to the plaintiff previously to his settlement with *Allen*; and it was rejected by Mr. *J. Van Ness*, before whom the cause was tried.

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*A verdict having been found for the plaintiff, the defendants now moved for a new trial.

Wells and *Brinckerhoff*, for the plaintiff.

P. W. Radcliff, for the defendants.

Per Curiam. We are of opinion that evidence of a mistake in the accounts of *Smith* and *Pardee* with *Allen* was properly rejected. The alleged mistake took place in *October*, 1814, and in *July*, 1815, the plaintiff settled with *Allen*, when there appeared to be due to the latter 4,156 dollars and 6 cents, allowing him the 5,000 dollars, in respect of which the mistake is alleged to have been committed. On that settlement, the sum of 4,156 dollars and 6 cents, which appeared to be due to *Allen*, was paid to him.

Now, had the defendants given notice of that mistake to the plaintiff, he would have made the settlement on very different principles; at all events, he would not have paid *Allen*, until the fact, whether there had been a mistake or not,

was ascertained. If a man deals with another's agent, and gives the agent a receipt for a sum of money which he had a right to pay, and on the faith of that receipt the principal settles with his agent, and pays him money, the party giving the receipt cannot lie by, until after the settlement between the principal and the agent, and then charge the principal with the payment of the same sum again. Good faith requires that the mistake should be communicated to the principal as soon as it is known; and, indeed, if a loss is to be borne, it must fall on him who occasioned it. In the present instance, it is not stated that *Allen* is irresponsible. That fact makes no difference, for he is answerable to the defendants as for money had and received, if it can be shown that he has been allowed 10,000 dollars, as paid to the defendants, when only 5,000 dollars were received by them. The case of *Wyatt v. The Marquis of Hertford* (3 *East's Rep.* 147.) supports the principle of this decision.

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Motion for a new trial denied.

*JACKSON, *ex dem.* STEVENS and others, against SILVERNAIL. [* 278]

THIS was an action of ejectment, for a farm in the manor of *Livingston*, and was tried at the *Columbia* circuit, where a verdict was taken for the plaintiff for part of the farm claimed, subject to the opinion of the Court, on a case containing the following facts:—*Robert Livingston*, the proprietor of the manor, on the 15th of *May*, 1784, executed a lease to *Johannes Drom* and his wife, for their joint lives, for the farm in question, containing 150 acres. It was, among other things, covenanted, that if the parties of the second part, or the survivor of them, should be minded "to sell and dispose of, or assign their estate in the demised premises," it should be lawful for them, or the survivor of them, so to do, provided they first obtained permission in writing under the hand and seal of the lessor, or his heirs or assigns, and not otherwise, &c. The lease contained a *proviso*, making it void, in case all and every the articles, covenants, and agreements, therein contained, on the parts of the lessees, were not observed and performed.

Where a lease for lives covenanted not "to sell, dispose of, or assign his estate in the demised premises," without the permission of the lessor, &c., and the lease contained a clause of forfeiture for the non-performance of covenants, it was held, that a lease of part of the premises by the lessee for 50 years, was not such a breach of the covenant as would work a forfeiture; and that nothing short of an as-

signment of his whole estate by the lessee would produce a forfeiture of the lease. Nor would a sale of the whole premises under a judgment and execution against the lessee work a forfeiture, there being no evidence of any fraud or collusion on the part of the lessee. (a)

(a) Vide *Jackson v. Kipp*, 3 *Wendell Rep.* 230. *Jackson v. Groat*, 7 *Cowen*, 286. *Jackson v. Harrison*, 17 *Jolins. Rep.* 66.

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On the 8th of *March*, 1815, *John Drom* executed a lease under seal to *David R. Waldo* and *David Dakin*, for the consideration of 644 dollars, by which he "demised, leased, and to farm let," for twenty years, 32 acres and 32 perches of land, part of the farm so leased to him. It appeared also, that the farm so leased was bid off by *Stephen Miller*, at a sheriff's sale, on a judgment and execution against *John Drom*, at the suit of *Miller*, for the consideration of 1010 dollars, the amount of the judgment being 1478 dollars of debt, and 16 dollars and 62 cents costs.

The plaintiff proved that the sheriff's sale was after the death of *Drom*, on a *fiery facias*, issued before his death; that *Stephen Miller*, being the highest bidder at that sale, did not take a deed to himself, but by a subsequent arrangement with the administrators of *Drom* and with the defendant, it was agreed that the defendant should take the deed from the *sheriff, upon the bid of *Miller*, and pay *Miller* his debt, and the balance, making 1,500 dollars in all, he should pay to the administrators of *Drom*; and the sheriff accordingly executed a deed to the defendant, who is in possession of the premises; the widow of *Drom*, for whose life, also, the lease was to endure, being still alive.

It was proved that the defendant admitted that he was in possession of about 18 acres of land, not included in the lease to *Drom*, and by the advice of the judge, a verdict was found for the plaintiff for 18 acres, 2 roods and 24 perches, absolutely, but subject to the opinion of the Court as to the residue of the premises.

The cause was submitted to the Court without argument.

PLATT, J., delivered the opinion of the Court. The plaintiff proved title under *Robert Livingston*. As to 18 acres, 2 roods and 24 perches, part of the land in possession of defendant, the plaintiff's right to recover is undisputed, and as to the residue, a verdict for the plaintiff was taken, subject to the opinion of the Court upon the facts stated in the case.

The only question is, whether a forfeiture has been incurred, or whether the covenant, on the part of the lessee, not "*to sell and dispose of, or assign his estate in the said demised premises,*" has been violated.

The plaintiff's claim is *stricti juris*; and to entitle him to recover, on the ground of forfeiture, he must bring his case within the penalty, on the most literal and rigid interpretation of the covenant.

In the case of *Crusoe, ex dem. Blencowe, v. Bugby*, (3 Wils. 234.) the lessee, in a lease for 21 years, covenanted not "*to assign, transfer, or set over, or otherwise do or put away the premises, or any part thereof,*" without permission; and then made a lease to a stranger, for 14 years, of the same premises, and it was held no breach of the covenant, on the ground that the

demise for 14 years was an under-lease, and not an *assignment*. (*Harg. Co. Litt.* 303. *a. Strange*, 405.)

In the case of *Roe, ex dem. Gregson, v. Harrison*, (2 *Term Rep.* 425.) the lessee covenanted that neither he nor his administrators would "*set, let, or assign over*" the demised premises, or any part thereof, without permission, &c., and authorized the lessor to re-enter for any breach of covenant. *The administrator of the lessee made an under-lease of the premises, *for less than the original term*, without license; and the Court sustained an ejectment for the forfeiture, on the ground that by the literal and necessary construction of the covenant, the lessee was restrained, not only from *assigning*, but also from *sub-letting*; the words "*set*" and "*let*" being synonymous with the word *demise*.

In the case now before us, the covenant is, that the lessee for lives would not "*sell and dispose of, or assign his estate in, the demised premises*;" and he executed a lease of part of the premises for the term of 20 years.

Applying the principles of the adjudged cases, it is clear, that *Drom* did not, in this case, violate his covenant, by giving the lease for 20 years. Nothing short of an assignment of his whole estate in the land could work a forfeiture. *Drom* conveyed only a *lesser estate* for term of years, out of his *larger estate* for life; which was plainly a mere *sub-letting*, and not a "*selling and disposing of, or assigning his estate in, the premises*." The words "*sell and dispose of*" as clearly refer to the "*estate*," as the word "*assign*." It is a covenant by *Drom* not to "*sell and dispose of*" his estate, nor to "*assign*" his estate; and he has done neither, by giving the lease for a term of years.

In regard to the sale under the judgment and *fieri facias*, it is well settled that such a sale does not work a forfeiture; unless it appear that the proceedings were voluntary and collusive on the part of the tenant, with a view to defraud his landlord of his rights. (*Doe, ex dem. Mitchinson, v. Carter*, 8 *Term Rep.* 57. *Jackson v. Corliss*, 7 *Johns. Rep.* 531.) There is no evidence of any such fraud in this case.

The transfer of *Miller's* bid at the sheriff's sale, and the arrangement between the defendant and the administrators of *Drom*, was perfectly reconcilable with good faith, and worked no prejudice to the rights of the landlord.

The plaintiff is, therefore, entitled to recover no more than the 18 acres, 2 roods, and 24 perches, to which his title was admitted at the trial; that part of the defendant's possession not being covered by the lease to *Drom*.

Judgment, for the plaintiff, accordingly.

END OF MAY TERM.

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ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN AUGUST TERM, 1818, IN THE FORTY-THIRD YEAR OF OUR
INDEPENDENCE.

KING *against* BUTLER.

Where a person has, at the request of an overseer of the poor, and on his promise that he would see him paid, boarded a pauper, and furnished him with necessaries, he may maintain an action of *assumpsit* against the overseer, although no order had ever been made for the relief of the pauper. (a)

IN ERROR to the Court of Common Pleas of the county of *Tompkins*.

The plaintiff in error brought an action of *assumpsit* in the Court below, against the defendant, in error, for boarding, lodging, nursing, and attending, one *Washburn*, at the special instance and request of the defendant. At the trial of the cause in the *September* term, 1817, of the Court below, the following facts were given in evidence on the part of the plaintiff:—In *November*, 1814, *Washburn* was taken sick at the house of the plaintiff, who immediately made application to the defendant, then one of the overseers of the poor of the town of *Ulysses*, to visit *Washburn*, and the defendant, having seen him, requested and directed the plaintiff to provide all things necessary until his recovery, and said that he would see him paid. The plaintiff, accordingly, furnished *Washburn* with board and necessaries during the space of eight weeks, and afterwards made out a bill against the town of *Ulysses*, and presented it to the board of supervisors *of the county of *Tompkins*; but they refused to audit his account, as an order for the relief of *Washburn* had never been obtained. Upon this evidence the counsel for the defendant moved for a nonsuit, which was granted by the Court below, and the plaintiff tendered a bill of exceptions to their opinion.

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(a) Vide *Palmer v. Vandenberg*, 3 *Wendell's Rep.* 193. *Fox v. Drake*, 8 *Cow. Rep.* 191. *Menckler v. Rochfeller*, 6 *Cow. Rep.* 276. *Gourley v. Allen*, 5 *Cow. Rep.* 644. *Fletcher v. Allen*, *Ibid.* 654. *Olney v. Wicker*, 18 *Johns. Rep.* 122.

The case was submitted to the Court without argument.

Per Curiam. The question in this case arises on a bill of exceptions, tendered to the Court of Common Pleas of the county of *Tompkins*. The action was brought against the defendant, who was one of the overseers of the poor of the town of *Uysses*, in that county, for the support and maintenance of a pauper. The proof in the Court below showed a most explicit and positive request, by the defendant to the plaintiff, to maintain the pauper, and an express and absolute promise to pay him for the same. But this was not deemed by the Court below sufficient, because no order had been given by a justice to the overseer, to provide for the pauper. In this the Court erred. Application was made, in behalf of the pauper, to the overseer for relief; and the relief was furnished at the request of the overseer. It was no part of the plaintiff's duty to see that the overseer had the order of a justice, as pointed out by the act. If the pauper was entitled to assistance, it was the duty of the overseer of the poor, on application being made to him, to inquire into the matter, and furnish the relief. He was under a legal, as well as a moral obligation, so to do; and this was a sufficient consideration for his promise to pay for the same. The act does not require that the person furnishing the relief should have an order from a justice for the purpose. This is a duty imposed upon the overseer, and is his authority for ordering the relief; but if he neglects to procure such order, it is his own fault, or negligence, and is not chargeable upon the plaintiff. (1 *N. R. L.* 237, 8.) The judgment of the Court below must, therefore, be reversed.

Judgment reversed.

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August, 1818.

CLAVERACK
v.
HUDSON

*Overseers of the Poor of the Town of CLAVERACK [*283]
against The Overseers of the Poor of the City of
HUDSON.

IN ERROR, on *certiorari* to the Court of General Sessions
of the Peace of *Columbia* county.

A., the owner
of an infirm
slave, executed
a bill of sale of
the slave to *B.*,

a person who was unable to maintain her, at the same time paying him 40 dollars to take her off his hands. *B.* then sold the slave, and, after several sales, she finally came into the hands of *C.*, who lived out of the state. The sales were all fair and *bona fide*. *A.* resided in *Claverack*; and after the sale to *C.*, the slave was left in the town of *Claverack*, and wandered into the city of *Hudson*; from whence she was removed by an order of two justices to the town of *Claverack*. Held, that the sale from *A.* to *B.* might be deemed collusive and void within the 14th section of the act concerning slaves and servants, (2 *N. R. L.* 206.) at the election of the justices, who might consider either *A.* as the master of the slave, or *C.*, although he lived out of the state, there being no evidence that he had exported, or attempted to export, the slave; and, therefore, the order was proper on both grounds; on the first, because *Claverack* was the place of settlement of *A.*; and on the other, because, if *C.* was the master, as he had no place of settlement within the state, and the slave had wandered from town to town, the justices were authorized by the 33d section of the act for the relief and settlement of the poor, (1 *N. R. L.* 292.) to remove the slave to the place from whence she last came.

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Two justices of the peace for the city of *Hudson* made an order for the removal of *Sarah*, a negro woman slave, from the city of *Hudson* to the town of *Claverack*, from which order the overseers of the poor of *Claverack* appealed to the Court of Sessions of *Columbia* county, which affirmed the order. It appeared from the return of the Court below, that the slave in question formerly belonged to *Peter Van Rensselaer*, of *Claverack*, in *Columbia* county, who, on or about the 20th December, 1814, executed a bill of sale of the slave to *Asel Woodworth*, of the town of *Claverack*, a very poor man, and wholly unable to maintain her, and at the same time paid him forty dollars to take her off his hands, the slave being infirm, subject to fits, and incapable of performing labor. At the time of executing the bill of sale, *Van Rensselaer* disclosed to *Woodworth* her true situation, and all her infirmities were fully set forth in the bill of sale. Soon after, *Woodworth* sold the slave to *David C. McKinstry* for ten dollars, and endorsed a transfer of all his right upon the bill of sale. *McKinstry*, a few days after, sold her to *Isaac Hatch*, in payment of a debt due from him to *Hatch*, who soon after sold her to *Theodore Curtis*, who sold her to a man by the name of *Jacobs*, who lived out of this state. *Hatch* and *Curtis* were freeholders in *Hillsdale*, in *Columbia* county; and they, as well as *Van Rensselaer* and *McKinstry*, were of sufficient ability to maintain the slave. The return also stated, that the slave was brought from *Hillsdale*, and left in the street in the town of *Claverack*, from whence she *wandered into the city of *Hudson*. The Court below decided that the sale from *Van Rensselaer* to *Woodworth* was void, and affirmed the order of removal.

James Strong, for the plaintiff in error. He cited acts sess. 36. ch. 78. s. 7. s. 33. 1 *N. R. L.* 279. 292. sess. 36. ch. 83. s. 14. 2 *N. R. L.* 201. *Concklin v. Havens*, 12 *Johns. Rep.* 314. *Jackson v. Walsh*, 14 *Johns. Rep.* 415.

Parker, contra.

PLATT, J. By the 14th section of the "act concerning slaves and servants," (2 *N. R. L.* 206.) (a) it is enacted, "that if any person shall, by fraud or collusion, sell, or pretend to sell, or dispose of, any aged or infirm slave, to any person who is unable to maintain such slave, such sale or disposition shall be void," &c.

By the 24th section of the same act, it is provided, "that if any person shall export, or attempt to export, any slave, to any place without this state, such person shall forfeit 250 dollars, and the slave shall be free."

And by the 33d section of the "act for the relief and settle-

(a) Vide 1 *R. S.* 658.

ment of the poor," (1 N. R. L. 292.) it is enacted, "that it shall be lawful to remove any slave who shall have left his master, or shall have wandered from town to town, to the place of settlement of his master, &c., if such place of settlement can be found in this state; and, if none such can be found, then to the place from whence such slave shall have last come," &c.

I incline to the opinion that the facts present a case within the purview of the 14th section of the act; and that the sale from *Van Rensselaer* to *Woodworth*, as it regards the town, must be deemed *collusive* and *void*. If so, the justices who made the order of removal had a right to elect, to consider either *Van Rensselaer*, or *Jacobs*, as the master of this slave; for, as applicable to such a case, the term "*void*" must be construed to mean "*voidable*," at the election of the justices who make the order. The purchasers under *Van Rensselaer*, who have successively speculated upon this slave, shall not be permitted, for their own private benefit, to *allege the illegality of the first transfer. They each, in succession, had a complete title, as against *Van Rensselaer*, and having had the benefit of their contracts, they must assume the correspondent risks.

If *Van Rensselaer* may not be regarded as the present master of the slave, on the ground that his transfer was collusive and void, then I think *Jacobs* is to be considered as the owner. For although the return states, that at the time of his purchase, *Jacobs* "*lived out of this state*," yet there is no evidence that he has "*exported, or attempted to export, her out of the state*." The forfeiture and the penalty accrue, not merely for buying a slave here, by a person living out of the state, but for carrying, or attempting to carry, such slave out of the state. The purchaser, in such case, acquires a qualified right; that is, he may either remove to this state, and keep the slave, or he may sell her to an inhabitant of this state.

Allowing, then, that the sale by *Van Rensselaer* was not *collusive*, and that *Jacobs* is to be regarded as the true owner, then, I think, the order of removal may be sustained; for the return states, that "the said *Sarah* wandered from the town of *Claverack*, into the city of *Hudson*;" which presents a case expressly provided for in the 33d section, which has been cited; to wit, that where a slave has wandered from town to town, and whose master's place of settlement cannot be found in this state, it shall be lawful to move such slave to the place from whence such slave shall have last come, &c.

On either ground, therefore, I am of opinion, that the order of the Sessions was correct, and ought to be affirmed.

SPENCER, J., and YATES, J., were of the same opinion.

THOMPSON, Ch. J., and VAN NESS, J., dissented.

Order of Sessions affirmed.

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August, 1818.
CLAVERRACK
V.
HUDSON.

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ALBANY,
August, 1818.

WILSON
v.
BOEREM.

*WILSON against BOEREM.

The declarations in *extremis*, of a person who would, if living, be a competent witness, are inadmissible evidence, either in a civil action, or a criminal prosecution, with the single exception of cases of homicide, when the declaration of the deceased, after the mortal blow, as to the fact of the murder, is admitted.

THIS was an action of *assumpsit*, on a promissory note for 305 dollars and 35 cents, payable in ninety days, drawn by *Thomas Shieffelin*, in favor of the defendant, by whom it was endorsed to *Josiah Brown, jun.*, and by him to the plaintiff. The cause was tried before Mr. J. Van Ness, at the New-York sittings, in December, 1816.

The note, endorsements, demand of payment, and notice, having been proved on the part of the plaintiff, the defendant produced witnesses to prove that the note was endorsed by *Brown* and the defendant, for the accommodation of *Shieffelin*, and delivered to the plaintiff by *Brown*, for the purpose of being discounted by him, but that he had never paid any thing on account of the note, and had pledged it to one *Simmons* for his own debt. The defendant's counsel, in order further to make out the defence, offered to prove the dying declarations of *Brown*, in relation to the note. The evidence was objected to by the plaintiff's counsel, but the judge ruled that the declarations of *Brown*, in *extremis*, were admissible, as to all such facts as he would be competent to prove, if then living and present. Accordingly, his wife, *Susan Brown*, was called, who testified that her husband died of a consumption, of which he had been ill for some time; that after he considered himself a dying man, and his recovery hopeless, he, in conversation with her, when alone, told her that the note had been drawn and endorsed for the purpose of getting it discounted for *Shieffelin*; that he had delivered it to the plaintiff, and charged him with wrongfully converting it to his own use, by pledging it for a debt, and that the plaintiff had never paid him any thing for the note. The witness also stated that her husband died about a week after this conversation; that no physician or clergyman had been with him, near the time that it took place, and that he had afterwards walked about the room. *Charles L. H. Shieffelin*, the son of the maker of the note, testified that *Brown* died on a Friday, and that *on the Sunday preceding, he called to see him; that *Brown* then considered himself a dying man, and was confined to his bed, and that he gave him the same account of the note as he had given to the preceding witness. *Thomas Shieffelin*, the maker of the note, also testified that he called to see *Brown*, who said, that the doctor had given him over, and made the same statement to this witness. Testimony was produced on the part of the plaintiff, to repel this defence, which it is unnecessary to notice.

The judge charged the jury, that if they believed the note in question had been drawn and endorsed for the special purpose

(a) Vide *Jackson v. Betts*, 6 Cowen, 371. S. C. in error, 6 Wendell, 173.

stated by the witnesses on the part of the defendant, and that this was known to the plaintiff when he took it, and if they also were satisfied that the note had never been negotiated for a valuable consideration to the plaintiff, but that it had been left with him by *Brown*, merely to raise money for the benefit of *Shieffelin*, that then they ought to find for the defendant, otherwise for the plaintiff. The jury found a verdict for the defendant, which the plaintiff now moved to set aside, and that a new trial be granted.

ALBANY,
August, 1832.
WILLIAM
V.
DOUGLASS

Simpson, for the plaintiff, contended, that the evidence of the declarations of *Brown* was inadmissible, being mere *hearsay*. (*Gilb. L. of Ev.* 6th ed. 135.) It is a settled rule in the law, that *hearsay* is no evidence.

Nor will the fact, that *Brown* was *in extremis*, when he made the declarations, create any exception to the rule, and make them evidence. It is true that some of the elementary writers on the law of evidence appear to have fallen into that error; and *Phillips*, in his late treatise, (p. 200.) after stating that "the dying declarations of a person who has received a mortal injury are constantly admitted in criminal prosecutions," and the reason of the rule, adds, (p. 201.) that "the same kind of evidence is admissible in civil cases, as well as in trials for murder." (See also *M'Nally's Evid.* 174.) But such evidence was never admitted in a *civil case*, nor in any *criminal case*, except that of *homicide*, and then from necessity only. Mr. *East*, in his treatise of the *Pleas of the Crown*, (Vol. 1. 353. 360.) considers the admission of such evidence as peculiar to "the case of *homicide*, and he states the circumstances under which it is admissible in that case. Mr. *Peake*, in his *Compendium of the Law of Evidence*, (p. 15. 3d ed.) also states the same limitations, as to the admission of the dying declaration of the party, in cases of murder, and cites *Woodcock's case*, (2 *Leach, C. L.* 563.) and the observations of Lord C. B. *Eyre*, as to the reasons for allowing such declarations to be evidence, under the peculiar circumstances of the case. Mr. *Luttrell's case*, (*Rex v. Reason and Tranter*, 1 *Str.* 499. 6 *St. Tr.* 195. *Foster, C. L.* 293.) appears to be the first in which the dying declarations of the deceased were admitted; and that was a very peculiar case, which seemed to justify some relaxation of the strict law of evidence. In the works of the earlier writers on *criminal law*, *Coke*, *Hale*, and *Hawkins*, no such rule is to be found. *Hale* (2 *H. P. C.* 52.) refers to the statute of 1 & 2 *Ph. & Mar.* cap. 13, which authorizes magistrates to take the examinations of prisoners, and the depositions of witnesses produced against them, and to return them to the Court of gaol delivery. He cites *Welsh's case*, (2 *H. P. C.* 285.) in which the examination of Mrs. P., taken before commissioners, under an act of parliament, was not allowed to be read against W. on an indictment

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for a forcible marriage of *P.*, because it was a proceeding according to the civil law, in a civil cause.

Hearsay evidence has sometimes been received on questions of *pedigree*, *prescription*, or *custom*, depending on general reputation; but a late case, (a) (*Berkley Peerage*, *Phillips's Ev.* 178.) in the House of Lords, in which all the judges delivered their opinions, shows with what extreme caution this species of evidence, even on questions of *pedigree*, is allowed; and it is never received where the declaration is made *after* a controversy has arisen on the question, *post litem motam*, for the declaration must be made under circumstances which precluded the possibility of any bias or interest operating on the mind of the person whose declaration is offered to be proved.

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*In *Wright v. Littler*, (3 *Burr.* 1244. 1255.) the declaration of *Medlicott*, as to the forgery, came out on a cross-examination, and no objection was made at the trial, and it was allowed under the special circumstances of the case. In *Aveson v. Kinnaird*, (6 *East*, 188.) evidence of the declaration of the wife, as to the state of her health, was admitted to contradict the evidence of a surgeon, who had examined her. These are the cases cited by Mr. *Phillips*; but the evidence was admitted not to prove the declarations of a person *in extremis*, and who, if living, might have been a witness, but merely to contradict what the same person had, when living, declared.

In *Jackson, ex dem. Coe, v. Kniffen*, (2 *Johns. R.* 31.) this Court decided, that evidence of the declarations of a testator, *in extremis*, that a will previously executed by him was extorted by *duress*, was not admissible. *Livingston, J.*, thought the declarations of a dying person ought never to be received as evidence in *civil* cases, and he doubted whether they ought to be received at all, even in criminal proceedings, unless in the single case where the party injured was the only witness, and his death might otherwise defeat the ends of public justice. In *Gray v. Goodrich*, (7 *Johns. Rep.* 95.) the Court say, that what a deceased person has been heard to say, except upon oath, or *in extremis*, and when he came to a violent end, never has been considered as competent evidence.

Again; *Brown*, if living, would not have been a competent witness. He was an *endorser* of the note, and incompetent, not only on the ground of interest, but on the principle which excludes a party to a negotiable paper from invalidating it by his testimony. (*Phillips's Ev.* 50.)

Van Wyck, contra, contended, that *Brown*, if living, would have been a competent witness, as his testimony did not go to invalidate the note in its first inception; (*Woodhull v. Holmes*,

(a) Vide 4 *Campbell's N. P. Rep.* 401. a report of the *Berkley Peerage Case*, before the House of Lords, May 13, 1811. Vide, also, *Raz. v. Cotton*, 3 *Camp. N. P. Rep.* 444.

10 *Johns. Rep.* 231.) and that evidence of his declarations in *extremis* was admissible. In criminal cases, it is undoubtedly the practice to receive such evidence; and Courts are more cautious in admitting evidence in criminal than in civil cases. The opinion of C. B. *Eyre*, in **Woodcock's* case, has been cited; and the principle on which such evidence is to be received is very forcibly stated by him. "They are declarations made in extremity, when the party is at the point of death, and every hope of this world is gone; when every motive to falsehood is silenced, and the mind induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as an obligation, equal to that which is imposed by a positive oath, administered in a Court of justice." All men are disposed to assent to the truth of declarations, made under circumstances which afford, perhaps, a higher test of truth, than if made by the party under the ordinary sanction of an oath. It is objected, that there can be no cross-examination in such case. But what is the object of a cross-examination? To elicit the truth. But if the death-bed, and the awful situation of the party, affords the strongest test of the truth of what he declares, no other or better test can be desired. We do not say that the evidence is, of itself, conclusive. It is *hearsay* evidence; but where a foundation has been laid for it by other evidence, it ought to go to a jury, either to corroborate or contradict the previous testimony. In *Wright v. Clymer* (S. C. 1 *Wm. Bl.* 345.) which has been cited, Lord *Mansfield* was of opinion, that the evidence was proper to be left to the jury. The case of *Aveson v. Kinnaird* is, also, in point. (*Phillips's Law of Ev.* 201.)

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THOMPSON, Ch. J., delivered the opinion of the Court. Assuming that *Brown* would have been a competent witness, had he been living, and admitting that he was in *extremis*, when the declarations were made which were received in evidence, (of which, however, there is very great doubt,) the only question in the case is, whether such declarations were at all admissible. No case, either in the *English* Courts or in our own, has fallen under my observation, where such evidence has been admitted in a civil suit. Such testimony is inconsistent with two fundamental rules in the law of evidence. It is mere *hearsay*, not under oath, and no opportunity is given for cross-examination; and writers on the law of evidence have, I apprehend, either fallen into a mistake, or been a little unguarded, in laying down the rule relative to the admission of the dying declaration of a person, even in criminal cases. *Phillips*, in his *Treatise*, (p. 200.) says, such evidence is constantly admitted in *criminal prosecutions*, and is not liable to the common objection against *hearsay* evidence. If he means to be understood, that this is a general rule of evidence in criminal prosecutions, he is not supported by any adjudged case. It is, I apprehend, confined to

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the single case of *homicide*; and so it seems to be considered by *East*, in his *Crown Law*. (vol. 1. p. 253.) "Besides," says he, "the usual evidence of guilt in general cases of felony," there is one kind of evidence *more peculiar to the case of homicide*, which is the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it was committed. Evidence of *this sort* is admissible, *in this case*, on the fullest necessity. For it often happens, that there is no third person present to be an eye-witness to the fact, and the usual witness, on occasion of *other felonies*, namely, the party injured himself, is got rid of. Whatever might have been the ground on which this kind of evidence was first admitted, in cases of homicide, we find it has long been an established rule in such cases, and, I may say, in such cases only. For wherever this rule is recognized by elementary writers, the cases referred to in support of it will be found to be those of homicide only. (*Stra.* 499. 2 *Leach*, 569. 638. 12 *Vin.* 118. 1 *East's C. L.* 353.) Baron *Eyre*, in *Woodcock's case*, considers it an exception to the general rule, which requires that witnesses should be examined in open Court on *oath*, and an opportunity afforded for *cross-examination*.

Phillips, (p. 201.) in treating of this rule in criminal proceedings, says, the same kind of evidence is admissible in civil cases, as well as in trials for murder. But he is not supported by any of the cases referred to, or by any other adjudged cases, that I have found. *Wright, ex dem. Olymer, v. Little*, (3 *Burr.* 1244. 1 *Wm. Blacks.* 345.) has been urged in support of this rule. But a recurrence to the facts will show that the circumstances of that case were special and peculiar; and the admission of the declaration of *Medlicott* was not supported under this rule. Lord *Mansfield*, in pronouncing the opinion of the Court, says, the testimony comes out on the cross-examination of the defendant's *counsel, and no objection made to it; and after mentioning the special circumstances of the case, he says, no general rule can be drawn from it; thereby expressly excluding the idea that the evidence was admitted merely as the dying declaration of *Medlicott*. Nor does the case of *Aveson v. Lord Kinnaird*, (6 *East*, 183.) which has also been pressed upon the Court, in any measure support such a rule of evidence. It was an action on a policy of insurance, on the life of the plaintiff's wife, warranted in good health when the policy was effected, and the dying declarations of the wife, as to her state of health at that time, were admitted; but not as declarations made, *in extremis*, by a person who might have been a witness, if living; for she could not, under any circumstances, have been a witness, if living. The plaintiff had produced a surgeon as a witness, to show, from his examination of her, and what she told him, that she was in a good state of health; and her account to another person of her health, at the same time, Lord *Ellenborough* said, was but a sort of cross-examination of the same witness. That

the inquiry was upon the subject of her own health, which was a fact of which her own declaration was evidence. That such declarations are always received upon such inquiries, and must be resorted to, from the very nature of the thing. I think it may safely be affirmed, that no such rule of evidence in civil cases is to be found in practice in the *English Courts*: with us there certainly is none such, and wherever it has been in any measure alluded to, it has uniformly been with disapprobation. That the question is still open with us, appears from the case of *Jackson v. Vredenburg*, (1 *Johns. Rep.* 163.) where it is said, that it will be unnecessary to determine whether, under any and what circumstances, the declarations of a competent witness, *in articulo mortis*, can be introduced as legal evidence in a civil cause. In *Jackson v. Kniffen*, (2 *Johns. Rep.* 35.) Mr. Justice *Livingston* says, if the declarations of dying persons are ever to be received in evidence, (on which, if *res integra*, much might be said,) yet in civil cases they never should be admitted. In *Capron v. Austin* (7 *Johns. Rep.* 96.) it is said, that the law requires the sanction of an oath to all parol testimony. It *never gives credit to the bare assertion of any one, however high his rank or pure his morals; and it is fairly to be inferred from this case, that the Court meant to say, that declarations *in extremis* were inadmissible evidence, except in the single case of homicide. Having an opportunity to cross-examine a witness is a high and important right, and ought not to be violated, except from the most imperious necessity; and I am persuaded, that neither principle nor policy requires the adoption of any such rule of evidence in civil cases. The dying declaration of *Brown*, in the case before us, ought not, therefore, to have been admitted in evidence. The verdict must, accordingly, be set aside, and a new trial awarded, with costs, to abide the event.

Judgment reversed.

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August, 1813.
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ALBANY,
August, 1818.

JACKSON
v.
MALIN.

JACKSON, *ex dem.* ELIZA S. MALIN, *against* RACHEL MALIN.

The testatrix devised as follows: "I give and bequeath to my daughter, E. R., all my property in W. in the state of Connecticut.—

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All the land deeded me by B., excepting 1000 acres of land, I deed to R. M.; also, the receipts that I now hold, &c.; also, as to personal property, I give her one mare," &c. And by a subsequent clause, she devised those thousand acres to R. M. It was alleged that the word *also* had been erased between the words "Connecticut" and "all," after the execution of the will, so as to give R. M. not only the 1000 acres excepted, but also the land out of which they were excepted. *Held*, that the alteration, if any, was perfectly immaterial, and that whether the word *also* were inserted or not, the land deeded to the testatrix by B., excepting 1000 acres she deeded to R. M., (which words were to be read as if in a parenthesis,) was devised to E. R.

An alteration, whether material or immaterial, made in a deed or will, by a person claiming under it, renders it void; but whether a material alteration by a stranger has that effect? *Quære.* (a)

Where the judge directed the jury to declare by their verdict whether a will had been altered after its execution, and, if so, by whom, and they declared by their verdict that the will had been altered by some interested person, the verdict was held to be uncertain, and a new trial was granted.

Where the defendant is apprized of a material witness, whose appearance he cannot procure in time, he ought to apply to the judge to postpone the trial; and if he goes to trial without the testimony of the witness, and a verdict is found against him, the Court will not grant a new trial for the purpose of letting in the evidence of the witness. (b)

THIS was an action of ejectment, brought to recover lands in Jerusalem, in township No. 7, in the second range of townships in the county of Ontario. The cause was tried before Mr. J. Spencer, at the Ontario circuit, in July, 1817.

Sarah Richards died in November or December, 1793, seised of the land in question, under a regular title, leaving the lessor of the plaintiff, her only child, who subsequently *married one E. Malin, since deceased, and claims the premises as heir at law of her mother. The defendant claims as devisee of Sarah Richards, and, at the trial, produced and proved her will, containing the following clauses:—

"Item. Fourthly; I give and bequeath to my dear and only daughter, Eliza Richards, all my property in Watertown, Litchfield county, in the state of Connecticut. [Blank.] All the lands deeded me by Benedict Robinson, excepting one thousand acres of land, I deed to Rachel Malin; also, the receipts that I now hold for lands or the avails of them; also, as to personal property, I give her one sorrel mare and colt, one pied cow, and four sheep."

"Item. Sixthly; I give and bequeath to my good and trusty friend, Rachel Malin, one thousand acres of land lying and situate in number seven, in the second range of the Massachusetts preemption in the county of Ontario and state of New-York, the said thousand acres to be taken off from the south end of the [Blank] I now own in the town, deeded to me by Benedict Robinson. Also, all that tract deeded to me by Thomas Hatheway, bearing date the second day of the fifth month, in the year of our Lord one thousand seven hundred and ninety-three; witnessed by W. M. Cartee and Abel Botsford. Also, all the lands that have or may arise from Asa Richard's estate, deceased; also, one sorrel horse, and all the rest of my stock together, all the rest of my farming utensils." The defendant and another person were appointed executors.

It was contended on the part of the plaintiff, that the will had been altered since its execution, by erasing the word *also*, be

(a) *Malin v. Malin*, 1 *Wendell's Rep.* 625. *Lewis v. Payn*, 8 *Cow. Rep.* 71.
(b) *Vide The People v. Supreme Court of New-York*, 5 *Wendell's Rep.* 114.

tween the words *Connecticut* and *all*, in the fourth item, and testimony was produced, on both sides, to prove and disprove the fact.

By the agreement of the counsel, on the recommendation of the judge, his honor charged the jury to declare, by their verdict, whether the will of *Sarah Richards* had been altered after its execution, and by whom; and the jury gave a verdict for the plaintiff, adding, that they considered that the will had been altered by some interested person. The defendant moved to set aside this verdict, and that a new trial should be granted, on a case containing the evidence *given on the trial, and, also, on the ground of surprise and newly-discovered evidence, supported by affidavits, that *William Stewart* was a material witness to negative any alteration in the will, and that, having been subpoenaed, he did not attend the trial.

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Sill, for the defendant, said he was aware of the old authorities on the subject; and that it is laid down, that an alteration of a deed by the party owning it, whether material or immaterial, renders it void; and that an alteration in a material part by a stranger, without the privity or consent of the owner, destroyed the deed. (*Pigot's case*, 11 Co. 27. 13 Vin. Abr. 39. *Faith* (U.) *Shep. Touchst.* 66. (68.) *Cro. Eliz.* 546.) But this was founded on the technical rule of pleading, which allowed the party, under the plea of *non est factum*, to avail himself of the objection, because it was not, at the time of the plea, his deed. This technical nicety and strictness, which avoids a deed in the hands of an innocent person, because it has been altered by a stranger without his knowledge or consent, is contrary to the first principles of justice and common sense.

Again; the alteration was not material; and if the alteration did make any difference in the devise, *R. M.* could have no interest to induce her to alter it. But there is no evidence that she did make the alteration. The jury have not found the fact. The finding is special, and leaves it uncertain as to the person who made the erasure. If there is the least doubt as to the meaning or intention of the jury, the Court will not pronounce a judgment on the verdict. (*People v. Olcott*, 2 Johns. Cas. 301. 311. *Rex v. Woodfull*, 5 Burr. 2661. 2669.)

E. Williams, contra. The only question is, whether the verdict is against evidence; for the affidavits do not disclose any newly-discovered evidence, or show surprise. The evidence now offered is merely cumulative. Even if there was any thing suspicious, yet, as the case has been fully and fairly left to the jury, the Court will not grant a new trial. (*Hollingsworth v. Napier*, 3 Caines's Cas. 182. *South v. Brush*, 8 Johns. Rep. 84.) This was not a special, but a *general verdict. The jury found a general verdict, and then, on being

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asked by the judge, they said that they considered that the will had been altered by some unknown person.

PLAINT, J., delivered the opinion of the Court. The affidavits on the part of the defendant show no grounds for a new trial. There is no *newly-discovered* evidence; nor was there any surprise. The defendant was fully apprized before the trial of what *Wm. Stewart* now swears, and actually subpœnaed him; and instead of moving to postpone the trial, for the want of his testimony, she voluntarily chose to take her chance without him. Unless there be other grounds, therefore, the defendant must abide by the verdict.

On the merits of the case, the plaintiff proved title in his testator, as sole heir of *Sarah Richards*, who is admitted to have died seised of the premises in dispute.

The defendant then proved the will of *Sarah Richards*, and claimed the land by virtue of that will.

The plaintiff then gave evidence to show that the will had been altered since its execution, by erasing the word "also," between the words "*Connecticut*" and "all," in the 4th item of the will, and that fact was controverted. The general custody of the will has been with the defendant, as executrix and devisee; but it has occasionally, and repeatedly, been in the possession of other persons.

The judge properly directed the jury to find, whether the will had been altered after its execution; and if so, by whom. The jury found a verdict for the plaintiff, and added the following words, "*and the jury considered that the will has been altered by some interested person.*"

In my judgment, the legal construction and effect of the will is the same, whether it be read *with* or *without* the alleged alterations. Nothing is given to *Rachel Malin*, in the 4th clause of the will, whether the word "*also*" be inserted or stricken out. "*Eliza Richards*" is the sole object of the testator's bounty in that clause, as it now stands. The words, "*excepting one thousand acres of land I deed to Rachel Malin,*" are to be understood as excepting so much from the general devise to *Eliza Richards*, and as referring* to the next clause in the will, which devises a thousand acres to *Rachel Malin*, by particular description; and thus ascertains the part *excepted* in the former devise to *Eliza Richards*, which was before indefinite. The words, "*excepting one thousand acres of land I deed to Rachel Malin,*" if construed with reference to the whole context, must be read as if in a parenthesis.

A different construction would involve a great absurdity, and require us to reject several words in the 4th clause as senseless and inoperative. For, according to such construction, the 4th clause devises to *Rachel Malin* "all the lands deeded (to the testator) by *Benedict Robinson*, excepting one thousand acres;" and in the next clause, that very one thousand acres is also

expressly devised to *Rachel Malin*. Thus the testator would be made to say, I give to *Rachel Malin* all my lands, &c., except one thousand acres, and I give her that one thousand acres too.

If the alleged alteration be *immaterial*, then the question is, whether the finding of the jury, in this case, is sufficient to warrant a judgment for the plaintiff.

The resolutions of the Court in *Pigot's* case (11 Co. 26.) were as follows:—"When a deed is altered in a *point material*, by the party claiming the benefit of it, or by a stranger, even without the privity of the obligee, or party claiming under it, the deed thereby becomes void."

"If the obligee himself alters the deed, although it be in words *not material*, yet the deed is void. But if a stranger, without his privity, alters the deed in any point *not material*, it shall not avoid the deed." The rule, as laid down in that case, in regard to *immaterial* alterations, seems to have been uniformly sanctioned by subsequent decisions; but the opinion expressed in *Pigot's* case, that a *material* alteration, though made by a stranger, without the privity of the party claiming under it, renders the deed void, is a proposition to which I am not ready to assent. That question is not before us; and the authorities show, at least, sufficient ground to consider that point still open for consideration. (4 Term Rep. 220. 2 Pothier, by Evans, 179, 180, 181. 5 Taunt. 707.) If the alleged alteration in this will was made by *Rachel Malin*, or with her privity, then the will is void; otherwise, it remains valid, notwithstanding the alteration.

In this case, the judge properly directed the jury to find, whether the will had been altered after its execution; and if so, by whom. I think the jury have not answered that question with sufficient certainty and precision. The verdict is, "*that the will has been altered by some interested person.*" The words, "*some interested person,*" do not necessarily designate *Rachel Malin*. Those words are as applicable to the lessor of the plaintiff as to the defendant. The verdict is uncertain on that point, and a new trial ought, therefore, to be granted, with costs, to abide the event.

New trial granted.

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Where a contract was entered into for the sale of a vessel, the possession of which was taken immediately, but it was agreed that a bill of sale was not to be given until the whole of the purchase money was paid, and in the mean time the register stood in the name of the original owner, who, however, exercised no

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control over the vessel in any respect, it was held that he was not liable for repairs made by direction of the master, as agent for, and on the credit of the purchaser, between the time of executing the contract, and the final consummation of it, by the delivery of a bill of sale, but that the persons furnishing repairs must look to the purchaser for payment. (a)

THIS was an action of *assumpsit*, for work done and materials furnished by the plaintiffs, in repairing the brig *Recompense*, against the defendants, as owners of the brig. The cause was tried before Mr. J. Spencer, at the New-York sittings, in April, 1817.

The brig was repaired by the plaintiffs, who were ship-carpenters in the city of New-York, during the month of September, 1815. She was originally registered at Middletown, in the state of Connecticut, and the register was in the name of the defendants as owners, from April, 1815, to the 28th of September, in the same year, including the time in which she was repaired by the plaintiffs. On the 3d of May, 1815, a charter-party of the brig was executed by the defendants and Luther Bingham, by which the former chartered her to B. for a voyage from New-York to the West Indies and back, *B. assuming all the expenses of the voyage, and paying 550 dollars per month, for the use of the brig. The charter-party mentioned that James Pierce was to sail as master for the voyage, who was appointed by B., with the consent and concurrence of the defendants. On the 4th of May, one of the defendants, in the name of both, gave a receipt to B. for four notes, payable at different periods and a small sum in cash, amounting altogether to 6,300 dollars, for which, when paid, or secured to be paid, they were to execute and deliver, or cause to be executed and delivered unto B. a bill of sale of the brig, and also to deliver and relinquish in his favor the above-mentioned charter-party. The last of the notes having been paid, the contract was consummated, by the delivery of a bill of sale, on the 14th of October, 1815, after the vessel's return from her voyage to the West Indies, for which she had been manned and fitted out by B., and after her being repaired by the plaintiffs.

B., who was examined as a witness, stated, that he could not say who employed the plaintiffs, but that it was either himself, or the captain, by his direction; that he was sometimes on board of the brig while repairing, but not often, and that the plaintiffs were strangers to him. He also stated, that he did not know whether the plaintiffs had ever sent a bill to him for repairs or not, but that they had once asked him if he would pay their demand, to which he replied, that it was out of his power; that he did not know that the defendants had had any concern with, or exercised any act of ownership over, the brig, after the execution of the contract for the sale of her, and that the repairs were commenced a few days after her return from her voyage.

Pierce, the master of the brig, stated, in his deposition, taken

(a) Vide *Thorn v. Hicks*, 7 Cow. Rep. 697.

de bene esse, that he was employed by *Bingham*; that after the vessel had returned to *New-York* and discharged her cargo, he was directed by *B.* to take her to be repaired, and that she was repaired by *Leonard*, one of the plaintiffs; that he did not himself employ *Leonard*, but he always understood and believed that *B.* had employed him. The deponent was master of the vessel on a subsequent voyage, commenced on the 29th of *September*, 1815; and during the whole time that he was master, acted under the orders and *direction of *B.*, as owner, and never received any orders from the defendants, or either of them, relative to the voyage. All the expenses of the first voyage were paid by *B.*, and the deponent frequently mentioned to *Leonard* that *Bingham* was the owner. *B.* came frequently to the place where the vessel lay, and in one instance consulted *Leonard* as to the expediency of sheathing her; but the deponent could not say whether *Leonard* saw *B.*, when he was at the vessel, more than once or twice.

A verdict was found for the plaintiffs, subject to the opinion of the Court, on a case containing the foregoing facts.

Cowdry, for the plaintiffs. The defendants are to be deemed the legal owners of the vessel, so as to be answerable for the repairs. The registry was in their names. It is true, there was a charter-party, but that ended in *August*, and the repairs were made in *September*; and until *October*, when the bill of sale was executed by the defendants to *Bingham*, the defendants must, in judgment of law, be considered the owner. (*Abbott on Ships*, part 1. ch. 2. s. 29, 30. *Westerdell v. Dale*, 7 Term Rep. 306. *Rich v. Coe*, *Cowp.* 336.)

The charter-party described the defendants as owners, and they were to continue such, until the happening of certain events. Suppose the contract with *B.*, as to the sale, had never been fulfilled on his part, would not the defendants have remained owners of the vessel; and the repairs have accrued to their benefit? In the case of *Young v. Brander and another*, (8 East, 10.) which may be cited by the defendants' counsel, the defendants had executed the bill of sale, and had done every thing in their power to divest themselves of the property, and the purchaser took possession, but neglected to deliver the certificate of registry to the proper officer, until nearly a month after the sale. And in *Wendover and another v. Hogeboom*, (7 Johns. Rep. 308.) which may, also, be cited on the other side, *Vosburgh*, the purchaser, took immediate possession of the vessel, and represented himself to the plaintiffs as the owner, and obtained an extension of the term of payment for the repairs.

**Griffin*, contra. The true and actual owner of a vessel is the person responsible for repairs, when the repairs are ordered by him, or by some person authorized by him as his agent. He is not answerable for repairs ordered by a *stranger*, or to any

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person voluntarily doing them, without any request or authority from him. (8 *East*, 10.) The register of a ship is necessary only to show her *national* character, and is not evidence that the person whose name is inserted in it is the owner. (*Sharp v. The United Insurance Company*, 14 *Johns. Rep.* 201. *Fraser v. Hopkins*, 2 *Taunt. Rep.* 5.) In *James v. Bixby*, (11 *Mass. Rep.* 36.) the grounds on which owners of vessels are liable for repairs are very clearly and distinctly stated, none of which exist in this case. The defendants gave no directions as to the repairs; they knew nothing of them; they were not done on their credit; nor have they derived any benefit from them; nor were the repairs ordered by any person having any agency or authority from the defendants. *Bingham* was the charterer, and, by the contract, was to have the appointment of the master, who, as well as the crew, were to be provided and paid by him. (7 *Johns. Rep.* 308.) Even if *B.* was not to be deemed owner, by virtue of the contract of sale, yet, being the charterer, and having the entire control and direction of the vessel, the defendants cannot be liable for repairs. (*Fraser v. Marsh*, 18 *East*, 238.) *B.* was the owner, *pro hac vice*.

Again; a mortgagee of a ship out of possession is not liable for repairs of the ship; or for necessities furnished for her. (*M'Intyre v. Scott*, 8 *Johns. Rep.* 159.) The defendants are not in a worse situation, in this respect, than a mortgagee out of possession. The agreement may be considered as a virtual, though not a formal mortgage.

T. A. Emmet, in reply. Owners of vessels are liable for repairs, unless a credit has been given to some other person, or they can show some act or contract which prevents their liability. The register is *prima facie* evidence of ownership. The defendants were, in fact, the real and legal owners. The charter-party speaks of *P.* as the master: he was appointed by the joint consent of the defendants and **Bingham*, and was their agent. *B.* could not remove him without the consent of the defendants.

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THOMPSON, Ch. J., delivered the opinion of the Court. The demand on which this action is founded is for repairs done to the brig *Recompense*. The ground upon which it is sought to make the defendants responsible, is, that they were owners of the brig. But this ground is not, under the circumstances of this case, tenable. The brig, on the third of May, 1815, had been chartered by *Bingham* for a voyage to the *West Indies*. The next day, she was purchased by *Bingham*; but, by the contract, a bill of sale was not to be given until the stipulated price was paid, or secured to be paid: possession was taken of the brig under this charter and contract. Having performed the voyage stipulated in the charter, the brig was sent by *Bingham* to the plaintiffs to be repaired, they being previously informed that she

was owned by *Bingham*, and he occasionally attending while the repairs were going on, and giving directions relating to them. Soon after the repairs were made, the last note given by *Bingham* fell due. The bill of sale was thereupon given, according to the contract.

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As between the parties to the contract, there can be no doubt this would relate back to the time when the contract was entered into. Third persons are not, however, to be prejudiced by such relation; and had the defendants remained in possession of the brig, or had the repairs upon her been made upon their credit, in any manner, the plaintiffs ought not to be affected by such relation; but that was not the case. They were not, in point of fact, employed by the defendants to make the repairs; nor could they be considered as looking, in any way, to unknown owners. For they were expressly informed that *Bingham* was the owner, and so far, therefore, as any claim upon the owner was relied on, he was the person they looked to for payment.

The register standing in the name of the defendant, did not, in any manner, determine the ownership of the brig, according to the decision of the Court in *Sharp v. The United Insurance Company*, (14 *Johns. Rep.* 201.) The repairs were not made for the defendants, or for their benefit, *by authority or direction of the master. He was not their agent, or acting under their authority or direction. He was, to be sure, the master agreed upon by the charter-party; but that was at an end some time before the repairs were made. *Pierce* was the exclusive agent of *Bingham*, the purchaser, and held the vessel for him; and he claimed under the contract, and not under the charter-party. So far as respected the repairs, the defendants were mere strangers, (8 *East*, 10.) and could derive no benefit from them. They had not a right to the possession or use of the vessel. She was held by *Bingham* under his contract. In the case of *Garman v. Bennet*, (*Stra.* 816.) it was held, that, *prima facie*, the repairer of a vessel has his election to sue the master who employs him, or the owners; but if he undertakes it on a special promise from either, the other is discharged. There was not, to be sure, in the present case, any special promise by any person to pay for the repairs. But there was something equivalent to it—an actual employment by *Bingham*, as owner, through his agent, the master; and there can be no doubt but *Bingham* would be liable for such repairs. When a master contracts for the use of the vessel, the credit is given to him in respect of his contract; and it is given to the owners, because the contract is on their account. (1 *Term Rep.* 109.) But when the contract is made on account of any particular person, as owner, it is on his credit, and not on the credit of any unknown owner, that the expenditure is made. This case is very analogous to that of *Wendover and Hinton v. Hogeboom and others*, (7 *Johns. Rep.* 308.) There, as in this case, the consideration money was to

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be paid by instalments, and a formal bill of sale was not to be executed and delivered until the payments were completed. No possession of the vessel was delivered; and it was held, that a regular bill of sale was not essential to transfer the property in a vessel, and that the former owners, under such a sale, were not responsible for articles furnished the vessel. They had ceased to be owners, so far as to exempt them from responsibility for supplies, especially as the credit was not given to them. These are principles which apply directly to the case before us, and go to exonerate the defendants *from the present demand. They are, accordingly, entitled to judgment.

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Judgment for the defendants.

QUIMBY *against* HART.

In an action of trespass on land, in a justice's Court, the defendant cannot, after pleading the general issue, interpose a plea of title; nor can he, under the general issue, give evidence of title.
(a)

IN ERROR, on *certiorari* to a justice's Court.

The plaintiff in error brought an action of trespass in the Court below, against the defendant in error, for cutting down his trees. The defendant appeared personally, pleaded the general issue, demanded a jury, and moved for an adjournment, which was granted; when the *venire* was returned, and the justice was about to impanel the jury, the defendant, by his counsel, offered a formal plea of title, and tendered security. The plaintiff objected to the new plea as too late, and the justice allowed the objection. The plaintiff having proved the trespass, the counsel for the defendant offered to prove title to the *locus in quo*, but the justice excluded the evidence. There was, nevertheless, a verdict, and judgment for the defendant.

Per Curiam. The only question is, whether the plea of title was tendered in due season to suspend the jurisdiction of the justice. We think it was too late after pleading the general issue, demanding a jury, and obtaining an adjournment. The defendant must make his election to interpose his plea of title, before any other plea. It would be inconvenient and irregular to allow a different practice.

Judgment reversed.

(a) Vide *Marsh v. Berry*, 7 Cow. Rep. 344. *Douglass v. Valentine*, 7 Johns. Rep. 273. *Strong v. Smith*, 2 Cuines's Rep. 23.

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v.
NEW-PALTZ.

*The Overseers of the Poor of the Town of PLATTEKILL against The Overseers of the Poor of the Town of NEW-PALTZ.

IN ERROR, on *certiorari* to the Court of General Sessions of the Peace of the county of *Ulster*.

An order was made by two justices of the county of *Ulster*, for the removal of *Charles Dempsey*, otherwise called *Thomas Shirkey*, and *Elizabeth*, his wife, from the town of *Plattekill*, to the town of *New-Paltz*, from which order the overseers of the poor of *New-Paltz* appealed to the Sessions of *Ulster* county, and the appeal was heard at the *September* term, 1816, of the Court below.

At the hearing, the overseers of *New-Paltz*, the appellants, offered as a witness *William Gerrow*, one of the overseers of the poor of *Plattekill*, to whom it was objected, that he was a party, and could not be compelled to testify, and had not consented to be a witness; but the Court overruled the objection, and compelled *Gerrow* to testify; but it is unnecessary to set forth his evidence. It was proved that the pauper had, in 1788 and 1789, paid taxes in the town of *New-Paltz*, and only once, if at all, in *Plattekill*, though he had resided there more than twenty years, and had received relief from the overseers of that town, but without any order of justices for that purpose. The pauper testified, that he had worked on land in *Plattekill* on shares, the owner's share being one third of the crop; that one year he had an extraordinary crop, and the owner's share amounted to more than thirty dollars worth, and would have amounted to more than thirty dollars for two years, if he had taken or exacted the whole of it, which, however, he did not, excepting in one year. Another witness testified that the owner's proportion of the crop was always very trifling; that the witness would not have given more than twenty dollars in any one year for it, *and that the land occupied by the pauper would not rent for more than twenty dollars; that the tract on which the pauper worked, consisted of more than 100 acres, of which the owner designated, every spring, the parts that he should cultivate.

The Court below quashed the order of removal, with costs, to be paid by the overseers of *Plattekill*.

C. Ruggles, for the plaintiffs in error. The order of the justices was, *prima facie*, evidence of a settlement in *New-Paltz*; and it was incumbent on the appellants to show a settlement in *Plattekill*. They attempted to show that the pauper had rented a tenement of the yearly value of 30 dollars, for two years, and actually paid rent and taxes in *Plattekill*; but he was not such a tenant as the act contemplates. Letting land, upon shares, for a single crop, does not amount to a lease. (*Bradish v.*

On an appeal from an order of removal, the Court of Sessions ought not to compel one of the overseers of the poor, who is a party to the appeal, to testify; but this is, notwithstanding, not a ground for reversing their order, as the proceedings were not before a jury, and this Court will reject the evidence improperly given.

Where a person occupied and cultivated land on shares, and in one year delivered to the owner, as his proportion of the crop, produce to the value of more than 30 dollars, but every other year, the share received by the owner was less than thirty dollars, it was held that this was not

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Schenck, 8 *Johns. Rep.* 151.) There should not only be a lease for two years, but an actual payment of rent. (*Fort Ann v. Kingsbury*, 14 *Johns. Rep.* 365.)

Again; *Gerrow* was an incompetent witness, on (1 *N. R. L.* 285. 36 sess. ch. 78. s. 20.) the ground of interest. (*Phillips, Es.* 57. 3 *East*, 7.) He cannot be compelled to testify. (*Title v. Grevett, Ld. Raym.* 1008.) The plaintiffs in error were entitled to have the cause heard and considered by the Court of Sessions, without the admission of any improper evidence whatever.

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Sudam, contra. *Gerrow* was bound to testify. His interest was too remote and contingent to render him incompetent. (*Falls v. Belknap*, 1 *Johns. Rep.* 486.) The witness proved that the pauper had been supported by *P.*, in 1813 and 1814, as an inhabitant of that town, where he had resided above 20 years. If it had been the case of a casual pauper, then, under the 16th section of the act, a distinct account of his maintenance should have been kept, and notice given to the overseers of *N.*, or the place to which he belonged. Not having conformed to the directions of the statute in that respect, the overseers of *P.* are concluded by their own acts; and having maintained and *treated the pauper as an inhabitant of *P.*, they are estopped to allege that he was not settled there. (14 *Johns. Rep.* 367.) It is to be presumed, that every thing was done by them legally: they cannot set up their own negligence, or illegal conduct, to avoid responsibility. It is, moreover, made the duty of the overseers of the poor, to keep a book, in which is inserted the names of all persons applying for relief, the sums allowed, &c. (28th sect.) They ought to be held to a strict performance of their duty, and after a lapse of three years, they ought not to be permitted to set up, that they have wholly neglected to obey the directions of the act, in order to charge the pauper on another town.

Again; it was not necessary to show an actual letting or leasing for more than one year: it is enough that rent to above the value of thirty dollars has been paid any one year. The question is as to the ability of the person; and it is the sum to be paid, and not the actual payment, which is to be considered (*Burr. Sett. Cas.* 235. 243.)

Ruggles, in reply. The testimony of the pauper himself is confused, and entitled to little or no weight. His evidence does not establish the fact of the annual rent being thirty dollars. Our statute requires the actual payment of rent; and so the Court decided in the case of *Fort Ann v. Kingsbury*.

The order for relief, given in 1813, ought not to conclude the overseers of *P.* The necessity of the case may demand immediate relief, and there need be no adjudication. There can be no appeal from such an order: it is a mere voucher. In the case of the *Overseers of Dover v. Howard*, (12 *Johns. Rep.* 242

195.) it was held, that an order of *filiation* and maintenance was not conclusive that the child was a pauper of D. (*Bott's Poor Laws*, 405. *Rex v. North Shields*.) But, in fact, there was no written order whatever. The relief was given informally and irregularly; and, under the circumstances, their accounts were allowed.

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Per Curiam. One exception to the proceedings of the Sessions is, that they compelled one of the overseers of *Plattekill*, a party on the record, to become a witness, in order to prove that the pauper had gained a settlement in *Plattekill*.

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On this point it is clear that the Sessions erred; but, as there has been no intervention of a jury, and the judges of the facts, and of the law, were the same persons, the only effect of that exception must be to discard the testimony of that witness.

The second exception is, that the Sessions decided wrong upon the evidence before them, as to the pauper.

The evidence is clear and uncontroverted, that the pauper, *Thomas Shirkey*, was assessed, and actually paid taxes, to the town collector of *New-Paltz*, in the years 1808 and 1809; and as against *Plattekill*, (independent of the illegal testimony,) it was proved that *Shirkey* had resided chiefly in *Plattekill* for the last twenty years; that he had received occasional support from the overseers of that town, but without any formal order for that purpose; and that he had one year worked land on shares, and delivered a part of the produce to the owner, worth more than thirty dollars; and that he continued afterwards to crop the land on shares for several years, but never actually delivered to the owner so much as thirty dollars' worth of produce for any one year, except the first. It is very doubtful whether the evidence proves a *tenancy* at all by the pauper; but, even if that were so, the law requires that he should have "actually and *bona fide* rented and occupied a tenement of the yearly value of thirty dollars, or upwards, for two years, and actually paid such rent," &c. According to this test, the paupers had no legal settlement in *Plattekill*, and were rightfully removed to *New-Paltz*, where they had acquired a legal settlement by having "been charged with, and actually paid, public taxes for two years."

The order of the General Sessions of *Ulster* county must, therefore, be reversed.

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*JACKSON, *ex dem.* NOAH, against DICKENSON AND THOMPSON.

The land of A. was sold under an execution, at the suit of B. against A., on the 1st of March; on the 10th, a mortgage of the same land filed a bill of foreclosure in chancery against A. and B., and on the 19th the sheriff executed a deed to the purchaser under the execution. Held, that the deed relates back to the time of the sale, and the purchaser is not precluded from contesting the validity of the mortgage in an action of ejectment at law, he not being a party to the bill, and as his title was acquired previous to notice of a *lis pendens* in chancery, although not consummated until afterwards. (a)

Notice of a *lis pendens* in chancery, to affect a subsequent purchaser, commences with the service of the *subpoena*.

The affidavits of jurors are ad-

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missible to show that a mistake had been made in taking their verdict, and that it was entered differently from what they intended.

THIS was an action of ejectment brought to recover a lot of land in *Orange* street, in the city of *New-York*, in the occupation of the defendant, *Thompson*. The cause was tried before Mr. J. *Van Ness*, at the *New-York* sittings, in *December*, 1816.

The premises in question formerly belonged to *Ephraim Hart*, against whom a judgment was docketed in favor of *Joel Hart*, on the 5th of *May*, 1812, on a bond in a penalty of 30,000 dollars, conditioned for the payment of 15,000 dollars, and secured by a warrant of attorney. A *fiery facias* was issued on this judgment, returnable on the 16th of *May*, and delivered to *B Ferris*, then sheriff of the city and county of *New-York*, on the 9th *May*, to which the sheriff returned that he had levied of the lands and tenements of the defendant therein, 4,759 dollars. The plaintiff also gave in evidence a deed from the sheriff to his lessor in fee, for the premises in question, and other property, dated the 1st of *March*, 1813, and a memorandum of a lease of the premises for two years, from the plaintiff's lessor to the defendant *Thompson*, under which he entered into possession, but in *February*, 1816, refused to pay rent to the lessor of the plaintiff, disclaimed holding under him, and claimed to hold under the other defendant, *Dickenson*.

The defendants produced in evidence a mortgage of the premises in question, executed by *Ephraim Hart* and his wife to the defendant *Dickenson*, dated the 18th *April*, 1811, to secure the payment of a bond of the same date, conditioned to pay the sum of 2,442 dollars, with lawful interest, on or before the 18th of *April*, then ensuing. On the 10th of *March*, 1813, *Dickenson* filed a bill in the Court of Chancery against *Ephraim* and *Joel Hart* and others, to foreclose the mortgage; and a decree having been made for the sale of the premises, they were sold by a master, and conveyed to *Dickenson* in fee, by deed, bearing date the 1st of *March*, 1816. *Ferris*, the sheriff, testified that the sale under J. **Hart's* execution was made on the 1st of *March*, 1813, after a regular advertisement, but that the deed was not delivered until the 19th. He further stated, that he was not present at the sale, and only knew from the returns of the officer who made it, to whom the land was sold; that from those returns it appeared, that of several parcels of land which were sold at the same time under the execution, some were bid off by *Joel Hart*, and some by the plaintiff's lessor; that the property in question appeared to have been bid off by

(a) *Doe v. Howland*, 8 Cow. Rep. 271. *Jackson v. Bowen*, 7 *Ibid.* 13. *Bissel v. Pryn*, 20 Johns. Rep. 3. *Jackson v. Ramsay*, 3 Cowen, 75.

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J. Hart, but that it was written on an erasure, and he could not say to whom it was originally entered; that within a day or two after the sale, (or, as he said on being examined again in a subsequent part of the trial, it might have been on the day of the sale,) *J. Hart*, and *Noah*, the lessor of the plaintiff, called on him together, and directed the deed to be made out to the latter; that he did not recollect that *Noah* paid any money; that when *J. Hart* and *Noah* came to settle, *J. Hart* said, that he had taken *Noah's* notes for the consideration money, and that the witness insisting to have some money to pay the printer's bills, &c. *J. Hart* paid the sum, and he took his note for the residue. The witness, however, on his re-examination, stated, that he thought, on reflection, that it was *Noah* who brought him the money to pay the expenses of the sale. The plaintiff contended, that the bond and mortgage to *Dickenson* were usurious and void, and produced testimony in support of this allegation.

The deposition of *Mordecai M. Noah* was produced on the part of the plaintiff, who testified, that in 1811, shortly before the delivery of the bond and mortgage, he was present at one or more interviews between *Dickenson* and *Ephraim Hart*, respecting a debt due from the latter to the former, and that they spoke of a note held by *Dickenson* against *E. Hart* having been dishonored; that *Dickenson* appeared to be very pressing to obtain his debt; that on the 18th of *April*, in the same year, at the request of *E. Hart*, he took the bond and mortgage to *Dickenson's* attorney, for which he was to receive a note and check, and that on the 19th of *April*, he received from the attorney *E. Hart's* note for 1200 dollars, dated *December* the 20th, 1810, payable in *ninety days to *J. Winter*, or order, and endorsed by *Winter*, and *E. Hart's* check on the *Manhattan* bank, dated the 12th of *April*, 1811, for 1000 dollars.

Napthali Phillips, on the part of the plaintiffs, testified, that in or about the month of *December*, 1810, *E. Hart* put into his hands, as a broker, to sell and raise money on for *Hart*, two notes, drawn or endorsed, the witness did not recollect which, by *I. Hart* and *J. Winter*, one being the maker and the other the endorser, for twelve or fourteen hundred dollars each, payable at three and four months; that he procured the notes to be discounted by *Dickenson*, at the rate of at least one and a half per cent. a month, and that *E. Hart* was at that time much pressed for money. It was stated by another witness, on the part of the plaintiff, and who attended the sale under the execution, that *Noah* was present and bid, and that all the lots, excepting one bid for by the witness, were struck off to him. It was further proved, that about the 30th of *March*, 1813, *Noah* delivered *J. Hart* an accountable receipt of the latter for 260 dollars, which amount had been placed in his hands by *Noah*, and a sum in cash; the accountable receipt, the interest then due thereon, and the cash, amounting to 3400 dollars, for which

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sum *J. Hart* gave *Noah* a receipt, as for the full amount of the houses and lots purchased by *Noah*, under the execution against *E. Hart*. A variety of evidence, beside that which has been already detailed, was produced in relation to the question, whether *Noah*, the lessor of the plaintiff, was the real owner of the premises, or was merely a trustee for *Ephraim* or *Joel Hart*.

A verdict was found for the plaintiff, subject to the decision of the Court, on this point, how far the plaintiff was bound by the proceedings in chancery. All the other questions arising in the cause were submitted to the jury.

At the time of bringing on the case to argument, the defendant also moved for a new trial, on the grounds that the verdict of the jury had been incorrectly taken, and of surprise, and for this purpose produced several affidavits.

Five of the jurors on the trial swore, that the only question of fact submitted to them was, whether a certain mortgage, executed by *Ephraim Hart*, under which the defendants claimed title, was usurious or not; and that the jury, by their verdict, found, and so expressed it to the Court, that there was "usury on the note," meaning and intending one of the notes negotiated by *Naphtali Phillips*. The deponents also said, that there was no other evidence offered on the trial to prove any usury on either of the notes, except the testimony of *Phillips*; and that, at the time of delivering their verdict, the Court inquired of the jury whether they intended to find that the usury in the note was connected with the mortgage, or to that effect; to which one of the deponents replied, that the jury did not intend to find so, but the deponents believe that the answer so made was not heard by the Court.

The defendant *Dickenson* deposed, that, having, previous to the trial, seen a copy of the deposition of *Mordecai M. Noah*, he was prepared with testimony to rebut, and did rebut, any presumption of usury in the mortgage, arising from the deposition, in a manner satisfactory to the jury, as appeared by their verdict; but not having had the least intimation or suspicion, that the plaintiff intended to impeach the note, the amount of which constituted a part of the sum secured by the mortgage, he was surprised by the testimony of *Phillips*, nor did he perceive the bearing of it, until his counsel were summing up, when he went for his bank and bill books, but was unable to find the entries, until after the judge had charged the jury, and that a few minutes after the jury went out, he found the entries, and had a witness in Court to prove that the notes received from *Phillips* had been paid in bank. He also deposed that neither of those notes (one being for 925 dollars and 75 cents, and the other for 675 dollars) had any connection whatever with the note referred to by *Mordecai M. Noah*; but that that note was for money lent by the deponent to *E. Hart*, at the rate of seven per cent., and that the difference between the

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sum, specified in the mortgage, and the note and check of *E. Hart*, was actually paid by the deponent, in money, to *E. Hart*, before the mortgage was executed. There were two other affidavits in support of the allegation, that the notes mentioned by *Phillips* had actually been paid.

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**Slosson*, for the plaintiff. The question is, whether the lessor is to be deemed a purchaser, *pendente lite*, so as to be barred by the decree of the Court of Chancery. The pendency of a suit in chancery commences from the service of the *subpœna*, after the bill is filed. (*Murray v. Ballou*, 1 *Johns. Ch. Rep.* 567. 1 *Vern.* 318.) The general rule is, that all persons in interest, at the commencement of the suit, must be made parties. (*Hickcock v. Scribner*, 3 *Johns. Cas.* 311. *Johnson v. Hart*, 11. 322.) *Noah* became a purchaser on the 1st of *March*, 1813, and the bill was filed on the 10th of *March*; but it does not appear when the *subpœna* was served. It is clear, however, that it could not have been served until after the purchase of *Noah*, at the sheriff's sale. His title, then, was not acquired *pendente lite*; and he had an interest which entitled him to be made a party to the suit; and, not being a party, he is not bound by the decree.

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Though the deed of the sheriff was not, in fact, executed and delivered until the 19th of *March*, yet it has relation back to the day of sale, or the time when it ought to have been delivered. (*Jackson v. Raymond*, 1 *Johns. Cas.* 85. *n. Heath v. Ross*, 12 *Johns. Rep.* 140.) So, in equity, whatever, for a valuable consideration, is agreed to be done, is considered as done, and money covenanted to be laid out in land, is considered as land, and descends to the heir. (3 *P. Wms.* 27. 215. 1 *Salk.* 154. 2 *Powell on Contracts*, 56. 58.) If the doctrine of relation; as laid down by the Court, is applied to this case, the lessor of the plaintiff must be deemed to have had a title to the premises on the 1st of *March*, prior to a *lis pendens*, and which cannot be defeated by a decree in that suit, to which he was not a party. That a person acquiring an interest, *pendente lite*, need not be made a party, and is bound to take notice of the proceedings in the suit, at his peril, is deemed a very rigorous rule, and has been adopted only from necessity.

As to the affidavits which have been read to support the motion for a new trial, on the ground of newly-discovered evidence and surprise, we object, *first*, that affidavits of jurors to impeach or alter their verdict are not admissible; (*Dana v. Tucker*, 4 *Johns. Rep.* 487. *Owen v. Warburton*, *4 *Bos. & Pull.* 326. *Jackson v. Williamson*, 2 *Term Rep.* 281.) and, *secondly*, that the facts stated are not sufficient to show any *surprise* on the part of the defendants, or to induce a belief that the additional evidence, if it had been produced to the jury, would have induced them to find a different verdict. There can be no use in sending back a cause to another jury, if the new testimony

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cannot vary the result. The jurors say they found usury in one of the notes, though not in the mortgage; but their finding a verdict for the plaintiff shows they considered the mortgage usurious as well as the note.

T. A. Emmet, contra. The question of usury ought to have been raised, if at all, in the suit in chancery, where justice would have been done, by directing the principal and the lawful interest to be paid.

The lessor of the plaintiff, having acquired his title subsequent to the commencement of the suit in chancery, must be affected by the proceedings in that cause. The time when a *subpœna* is served, is material only between the parties to the suit. As it regards the rest of the world, the filing of the bill is the commencement of the suit; and a suit actually pending in a Court of record, is notice to all the world. To take a conveyance of the property, during the pendency of a suit, is champerty, and renders the deed void. (*Jackson, ex dem. Bryant, v. Ketchum, 8 Johns. Rep. 479.*) It is clear, that no money passed from *Noah*, at the time of the purchase. He knew of the proceedings in chancery, and was, then, a trustee for the parties to the suit in chancery.

Again; the defendant *D.*, as a mortgagee, had a right to bring his action to put *Hart* or *Noah* out of possession. He has, moreover, acquired a distinct title, as a purchaser, under the decree of the Court of Chancery. He has acquired a *legal* title, which merges all title under the mortgage. He is a *bona fide* purchaser under a *judicial* sale. The not being made a party can only give *Noah* a right to redeem; and he might, by filing a cross bill, have claimed the equity of redemption. But after lying by, and permitting the suit to go on to a *final decree and sale, he comes too late with his objection. In *Jackson, ex dem. Bartlett, v. Henry, (10 Johns. Rep. 185.)* it was decided that a *bona fide* purchaser, under a sale duly made pursuant to the statute, by virtue of a power contained in the mortgage, was not affected by usury, in the original debt for which the bond and mortgage were given. (*a*)

Where a person brings his action, to be relieved against a usurious contract, he must first tender all the money really advanced. (*Fitzroy v. Guillim, 1 Term Rep. 153.*)

Affidavits of jurors, compatible with their verdict, and which do not impeach it, are admissible. Here the jurors say only, that a *mistake* has been made, by the clerk or the judge, in entering their verdict.

Harison, in reply, said, that it was a well-settled and very salutary principle, that where a bill was filed, and a *subpœna*

(*a*) In *Jackson, ex dem. Sternbergh, v. Dominick, (14 Johns. Rep. 435.)* the mortgagee himself, being a party to the usurious contract, was considered not to be such a *bona fide* purchaser.

issued, all subsequent purchasers must be bound by the decree, without being made parties. The mere filing of a bill is not sufficient to create such a *lis pendens* as will affect subsequent purchasers; the suit must be in full prosecution; the *subpœna* must be served. Such was the rule, as laid down in *Murray v. Ballou*. The law, as it has been stated, is not denied by the counsel on the part of the defendants. He alleges, merely, that the lessor of the plaintiff was not a purchaser at the sheriff's sale, and that he acquired no interest or title until after the suit was pending in chancery. [Here the counsel discussed the evidence in the case.]

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YATES, J., delivered the opinion of Court. The rule that a *lis pendens* in the Court of Chancery, (1 *Johns. Chan. Rep.* 576.) which must begin from the service of the *subpœna* after the bill is filed, is considered notice to a subsequent purchaser, so as to affect and bind his interest, cannot now be controverted; but according to the facts disclosed by the testimony in this case, it does not appear that the suit in chancery had been instituted when the sale took place. *The deed, although subsequently executed by the sheriff, to the lessor of the plaintiff, for the premises in question, cannot, then, be illegal and inoperative, on the ground of *notice*, for the purchase was made on the 1st of *March*, and the filing of the bill (without noticing the time of issuing the *subpœna*) was not until the 10th of *March*. The subsequent delivery of the deed, being mere matter of form, must have relation back to the time of purchase at the sheriff's sale. When the *subpœna* issued does not appear. In *Jackson v. Raymond*, (1 *Johns. Cas.* 85.) it is stated, in the opinion delivered by one of the judges, as a general principle, that whenever it is intended to be shown, that nothing passed by a grant, by reason that, at the time, there was a possession in another adverse to the grantor, the time to which the grant is to relate, is the time when the bargain or contract for the sale and purchase of the land was finally concluded between the grantor and grantee; and, consequently, any intermediate adverse possession, before the execution of the conveyance, which is the technical consummation of evidence of grant, can never affect it. If this principle is correct, it applies with equal, or greater force, to the commencement of a suit in chancery, between the time of a sheriff's sale, when the purchase is actually made, and the giving of the deed by him. In such case, the delay in not delivering the deed is an omission of duty in the public officer, and his *laches* ought not to prejudice the rights of the party.

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That the lessor of the plaintiff was the purchaser, cannot now be questioned. There was sufficient testimony to authorize the jury to infer it. *Ferris*, the sheriff, on being called a second time, stated, that, on reflection, he thought that *Hart* and *Noah* came to him on the day of sale, and requested that the deed should be given to *Noah*. If, then, *Noah* was a *bona*

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fide purchaser at the sheriff's sale, before the existence of the suit in chancery, or there was a *lis pendens*, it follows, that to make the decree conclusive on him, he ought to have been made a party. Not being a party, so far as relates to his title, the rights of the mortgagee, under the mortgage sale, notwithstanding the decree, remained open for discussion, and the purchaser at the sheriff's sale *retained the right of contesting its validity at law, without tendering the amount of principal and interest due on the mortgage. If, on the trial, it should be made to appear that the consideration for which the mortgage has been given is usurious, it is sufficient to protect the lessor in claiming under the sheriff's deed. The question of usury was therefore important, in settling the rights of the parties, and although the testimony on that part of the case might, perhaps, warrant the verdict, as it now appears, yet, from the facts stated by the jurors, as to what took place in delivering in their verdict, it would seem not to have been as entered by the clerk at the circuit. What the jurors have deposed must be noticed by the Court, because their affidavits are not as to what transpired while deliberating on their verdict, but as to what took place in open Court in returning their verdict, and shows that the clerk made a mistake in entering, or the Court in directing, a different verdict. The information afforded by the affidavits of the jurors, is not to impeach, but to support the verdict really given by them. This mistake, then, is manifest; and from the affidavits of *Pratt* and *Dickenson*, there is reason to believe that the defendants were surprised with testimony on the trial; and it being an action of ejectment, in which the rule applicable to other cases, as to new trials, is not so rigidly enforced, it is the opinion of the Court, that a new trial ought to be granted.

New trial granted.

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*COOPER against BISSELL.

Where a Court of C. P. refused leave to amend a general verdict, by applying the evidence to one count, and to enter a *nol. pros.* as to the other, this Court, on a writ of error, judgment having been entered on the verdict below, cannot grant leave to amend the record. (a)

STORRS moved for leave to enter a *nolle prosequi* as to one count, on an affidavit stating that this was a writ of error to the *Oneida* Court of Common Pleas; that the declaration contained two counts, one in trover, and the other in trespass, for taking a horse; that the verdict was general, and that the evidence applied to either count; that an application had been made to the Court below to amend the verdict, by applying it to one count, and for leave to enter a *nolle prosequi* as to the other, which motion had been refused. He contended that the Court

(a) Vide *Rockfeller v. Donnelly*, 8 Cow. Rep. 623.

of Errors had a right to make the amendment requested, as fully as the Court below.

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Talcot, contra.

Per Curiam. There are several insuperable objections to the motion.

When one count in a declaration is good, and the others bad, if the judge will certify that the evidence applied solely to that count, or that all the evidence given would properly apply to that count as well as the others, the verdict may be amended by applying it to the good count; and if the evidence did not particularly apply to the bad count, the verdict may also be amended. (1 *Caines's Rep.* 381. 1 *Johns. Rep.* 506.)

Admitting that one of the counts here is bad, on account of the misjoinder, (a) the amendment can only be made in the Court where the trial took place, and by reference to the judge's notes.

It is believed there is no instance of an amendment in a Court of errors, by inquiring into facts *dehors* the record. There is nothing in this Court to amend by. A Court of errors will either overlook clerical mistakes, or they will amend them in furtherance of justice, where there is any thing to amend by: it would not, in this case, be discreet in the Court to make the amendment, if they had the power; for *this motion has been submitted to the Court below, where the trial took place, and that Court has refused to make the amendment.

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In the present case, a judgment has been given upon the verdict, and, consequently, it is completed: if any error has intervened, it is an error of the Court in point of law; and in such case, it is very questionable, indeed, whether this Court can amend: the better opinion is, that it cannot. (*Ray v. Lister.* 1 *Andrews*, 884, 885.)

Motion denied.

(a) B. C. 1b *Johns. Rep.* 146.

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Where a person, seised of land in fee, mortgages it, and afterwards marries, his widow, on his death, is entitled to dower out of the equity of redemption. (a)

Where the husband was seised of the land in severalty, the widow cannot proceed under the act for the partition of lands, sess. 36. c. 100. (1 N. R. L. 507.) for the purpose of obtaining her dower. [*320]

er; nor can she be made a party to a partition among the heirs, devisees, or grantees of her husband.

But it seems that where the husband was seised as joint tenant, or tenant in common of land, the widow, as her right of dower extends only to an undivided part, is a proper party to a partition among the several joint owners.

MARY COLES, Widow of S. COLES, against S. W. COLES.

IN partition, under the act for the partition of lands, passed April 12th, 1813, sess. 36. c. 100. (1 N. R. L. 507.) (b) The defendant pleaded *non tenent insimul*, and the cause was tried before Mr. J. Van Ness, at the New-York sittings, in June, 1817.

Stephen Coles, deceased, was, in his lifetime, seised in fee of the premises in question, which, on the 20th of April, 1796, he mortgaged to the *Marine Society*, for the payment of 500 dollars, with interest. S. Coles and the plaintiff unmarried in 1804. By deed, dated the 15th of January, 1813, S. Coles conveyed the premises to the defendant, (but the plaintiff did not join in the conveyance,) and died in April, 1816. The mortgage to the *Marine Society* was still outstanding, but the interest thereon had been regularly paid, first by S. Coles, and afterwards by the defendant. The plaintiff proceeded in this action for the purpose of obtaining her dower, and at the trial, a verdict was taken in her favor, subject to the opinion of the Court, on a case containing the above facts.

R. Bogardus, for the plaintiff. There can be no doubt that a widow has a right of dower, in an equity of redemption in land mortgaged by her husband before their marriage. (*Hitchcock v. Harrington*, 6 Johns. Rep. 290. *Collins v. Torrey*, 7 Johns. Rep. 278.)

As to this mode of proceeding under the partition act, to obtain her dower, though, under the former act (1 K. & R. 513.) of partition, it might not be allowed, yet in the newly-revised act, passed April 12, 1813, (1 N. R. L. 507—513.) (c) there are several sections, in which provision is made for proceeding in case either party is a tenant in dower, by the courtesy, or for life; and in the act passed the 15th of April, 1814, (sess. 37. ch. 198.) (d) provision is made for the right of dower, in case of a sale under the partition act.

T. A. Emmet, contra. This Court have not yet gone the whole length of the doctrine, contrary to the English law, (e)

(a) But where the husband takes a conveyance of land, and, at the same time, mortgages it to the grantor to secure the purchase money, the widow cannot claim dower in the premises. *Storr v. Tift*, 15 Johns. Rep. 458. And see *Coates v. Cheever*, 1 Cowen, 460. *Jackson v. De Witt*, 6 Cowen, 316.

(b) 2 R. S. 317.

(c) 2 R. S. 317, 318.

(d) 2 R. S. 325, 326.

(e) Vide *Dixon v. Sarille*, 1 Bro. C. C. 325—328. But in *Banks v. Sutton*, 2 P. Wms. 700. Sir Joseph Jekyll, master of the rolls, held, in 1792, that a widow might be endowed of an equity of redemption, though there was a mortgage in fee before marriage. The law in England is, however, taken to be as laid down in *Dixon v. Sarille*, (*Cruise Dig.* tit. 12. ch. 2. s. 12. tit. 15. ch. 3. s. 9, 10. *Powell on Mortgages*, 718—753.) on the mere technical ground that a mortgage in fee is analogous to a trust, of which the wife was no more dowerable than she was of a use at common law, before the statute of uses. (*Attorney-General v. Scott*, *Cases Temp. Talbot*, 148.)

that a widow may be endowed of an equity of redemption. It has only been decided, that the tenant claiming under the heir of the mortgagor was estopped to deny his *seisin*, or avail himself of the mortgage to defeat the widow's dower. [SPENCER, J. In *Runyan v. Mersereau*, (11 Johns. Rep. 534.) we held that a mortgage, at law, as well as in equity, was a mere security for money; that the mortgagee has only a chattel interest, and that the freehold remains in the mortgagor.] (a)

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But there is another and a fatal objection to this action. Instead of bringing her action for dower, and before any dower has been assigned to her, the plaintiff proceeds under *the act for partition, as if she were a tenant in common. In *Bradshaw v. Callaghan*, (5 Johns. Rep. 80. S. C. in Error, 8 Johns. Rep. 558.) the Court say that a widow's dower is not within the purview of the partition act; that she is not a *joint tenant*, or *tenant in common*, or *coparcener*. Here is a plea of *non tenent insimul*; and how can the plaintiff make out a tenancy in common? The plaintiff has no *estate*, until dower has been assigned to her. She has nothing but a mere right: the heir is seised of the whole estate.

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PLATT, J., delivered the opinion of the Court. The widow filed her petition under the "act for the partition of lands," to which the defendant pleaded *non tenent insimul*. Upon the trial of that issue, the widow claimed *dower* in the lands described in the petition; and there was a verdict for the plaintiff, subject, &c.

Upon the evidence stated in the case, two questions were made on the argument:—

1st. Whether a widow is entitled to dower when the husband died seised of an equity of redemption only, having mortgaged the land before marriage.

2d. Whether dower can be assigned under the act for the partition of lands.

Upon the first point, I think the decisions in the cases of *Hitchcock v. Harrington*, (6 Johns. Rep. 290.) and *Collins v. Terry*, (7 Johns. Rep. 273.) have settled the law in favor of the widow's claim of dower.

On the second point, it was decided in the case of *Bradshaw v. Callaghan*, first in this Court, (5 Johns. Rep. 80.) and afterwards in the Court of Errors, (8 Johns. Rep. 558.) that a tenant in dower is neither a *joint tenant*, a *tenant in common*, nor a *coparcener*, and, therefore, not within the purview of the "act for the partition of lands;" that a partition under that act, among the other tenants, without reference to the right of dower, is valid; and that her rights cannot be affected by the partition; nor is she liable for any part of the costs.

Those decisions were made under the act of the 7th of April, 1801, (1 K. & R. 542.) which was re-enacted the 12th *of

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(a) Vide *Wilson v. Troup*, 2 Cowen, 195. *Lane v. Shears*, 1 Wendell, 437. acc.

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April, 1813, (1 *N. R. L.* 507.) (a) with the addition of six new sections, to wit, 14, 15, 16, 17, 18, and 19.

The 14th and 15th sections of the new act, it is contended on the part of the plaintiff, have enlarged the purview of the former statutes so as to embrace a tenant in dower. (1 *N. R. L.* 513.) (b)

The legislature, in enacting those additional sections, seem to have assumed that, according to the former statute, a tenant in dower might be a party in partition. The new sections do not expressly alter the law in that particular; but assuming that such a right existed, they make provision for the more convenient and effectual exercise of the right.

The new provisions in the act of the 12th of *April*, 1813, do not, however, alter the law as it was expounded in the case of *Bradshaw v. Callaghan*, (9 *Johns. Rep.* 558.) In that case, the seisin of the husband was of an entire parcel of land in *severalty*, and the Court decided that partition should be of the *whole land* among the heirs or devisees, without making the widow a party, but subject to her claim of dower in the whole.

But suppose the husband seised as *tenant in common*, the right of dower is correspondent: it can then be in an *undivided share only*, and a partition must be made before the dower can be assigned. May not the widow, having no interest but that of dower, be a necessary party in partition when the object is merely to sever the tenancy in common, in order to have her dower afterwards assigned? I incline to think she may, and *ought*, to be a party to the partition in the latter case; and if so, then the 14th section of the act of the 12th of *April*, 1813, must be construed as referring to cases where the seisin of the husband was that of a *tenant in common*. Considering all the statute provisions *in pari materia*, I am of opinion that where the seisin of the husband, as in the present case, was *in severalty*, the "act for the partition of lands" affords no remedy for *setting off* dower.

The act of the 15th of *April*, 1814, (ch. 198. s. 1.) (c) authorizes a sale of the widow's dower in partition, where the subject is indivisible, &c., provided the widow be made a party to the proceedings; but this latter act affords no aid *to the plaintiff in the present case. Where the object is *to sell* the real estate under the partition act, the widow may be made a party, and then she is concluded; but she is not to be made a party in partition for the purpose of *setting off* her dower.

The verdict for the plaintiff ought, therefore, to be set aside, and the petition for partition to be dismissed, with costs.

Judgment accordingly. (d)

(a) 2 *R. S.* 317.

(b) 2 *R. S.* 318.

(c) 2 *R. S.* 325. 6

(d) *Jackson v. Bowen*, 7 *Conn. Rep.* 13.

ALBANY,
August, 1818.FOWLER against SHARP and another, Executors of
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SHARP.

THIS was an action of assumpsit. The declaration contained counts for the use and occupation of a dwelling-house by the testator; for money had and received, &c. by the testator; and for rent on a parol demise by the plaintiff to the testator. The defendants pleaded, 1. *Non assumpsit*; 2. Payment; 3. *Actio non accrevit infra sex annos*; and, 4. the following plea:—

“And for a further plea in this behalf, the said *John Sharp*, (the other defendant was returned not taken,) “by like leave of the Court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *Theodosius Fowler* ought not to have or maintain his aforesaid action thereof against him, the said *John Sharp*, because, he says, he had not, on the day of exhibiting the bill of the said *Theodosius Fowler*, in this behalf, or any time since, had any goods or chattels which were of the said *Robert Sharp*, deceased, at the time of his death in the hands of him, the said *John Sharp*, as executor, as aforesaid, to be administered, *and this he is ready to verify. Wherefore he prays judgment,” &c.

The plaintiff demurred specially to this plea, and showed for causes of demurrer that the defendant had not in his plea alleged, that he, the defendant, had fully administered all and singular the goods and chattels which were of the said *Robert Sharp*, deceased, at the time of his death, and which had ever come to the hands of the defendant, as executor, to be administered; and that the defendant had not alleged that he had never had any goods or chattels which were of the said *Robert Sharp*, deceased, at the time of his death in the hands of the defendant, as executor, to be administered. The defendant joined in demurrer.

Peter A. Jay, in support of the demurrer, said, that great strictness was required in the plea of *plene administravit*. The defendant does not allege the fact in his plea that he has fully administered, as he ought to have done according to the forms given in the books. (2 *Chitty*, Pl. 451. 3 *Went*. Pl. 211. 214. *Rast. Ent.* 223.) *Comyns* (*Com. Dig. Pleader*, 581. (2 D. 9.) says if the plea of *plene administravit* is, that the defendant *nulla habet bona*, without more, it is bad, or that *plene administravit*, omitting *et quod nulla bona*, &c., as in *Hewlet v. Framingham*, (3 *Lev.* 28.) where the defendant pleaded, that “he fully administered all the goods which were of the testator at the time of his death, or at any time since, except goods and

A plea by an executor, stating, that he had not, on the day of exhibiting the plaintiff's bill, nor any time since, had any goods or chattels which were of the testator at the time of his death, in his hands to be administered, without alleging that he had fully administered the goods and chattels which were of the testator at the time of his death, and which had come to the hands of

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the defendant to be administered; and without alleging that he never had any goods or chattels of the testator in his hands to be administered, is good, both in form and substance.

And the exhibition of the bill, mentioned in the plea, is tantamount to the commencement of the suit, or suing out the writ, and will be so regarded, unless the plea is specially demurred to on that ground. (a)

(a) Vide *Hurdick v. Green*, 18 *Johns. Rep.* 14. *Soulden v. Van Rensselaer*, 3 *Wendell*. 472. *Ross v. Luther*, 4 *Cowen*, 158.

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chattels to the value of 10 pounds, which are not sufficient to satisfy," &c., which plea was held bad, on demurrer, because, for want of the words "and that he has no goods or chattels of the testator, nor had any on the day of suing out the writ aforesaid, or at any time since," &c.

Caines, contra, insisted that the plea contained every thing requisite to constitute a good defence. If there were no assets, it would be absurd for the executor to plead that he had fully administered them. *Chitty*, in the second edition of his treatise on pleadings, gives this precise form, and refers to the note of Serjeant *Williams*, (2 *Saund.* 220. n. 3.) who says, the words "that they have fully administered *the goods," &c., are superfluous, and that the more formal and correct way of pleading appears to be, "that they have no goods or chattels," omitting the preceding words, "that they had fully administered."

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SPENCER, J., delivered the opinion of the Court. If the plea in substance alleges that the defendant had not, at the time of the plea pleaded, nor at the commencement of the suit, or any time since, had any goods, &c., in his hands, as executor, to be administered, it would seem to be a good plea. The precedents are, that the executor has fully administered, in addition to the allegations of the plea under consideration. Serjeant *Williams* is of opinion that the words, "that they have fully administered the goods," &c., seem to be superfluous, and that the more formal and correct way of pleading appears to be according to the present plea. (2 *Saund.* 221. note 3.) And although *Chitty* gives the form of the plea, as the plaintiff's counsel contend it should be, yet the form of the replication, as given by him, takes issue on the defendant's having assets in his hands to be administered, on the day of exhibiting the bill; and this shows that the material and essential part of the plea is the possession of unadministered assets.

I cannot perceive that the omission to state, that the defendant has fully administered, is either a formal or substantial omission, and I consider the plea good without that allegation.

The case of *Hewlet v. Framingham* (3 *Lev.* 28.) confirms my opinion; for, in that case, the Court held the plea to be bad, because it omitted to allege that the defendant had no goods or chattels of the testator, and that he had not, on the day of suing out the writ, or at any time after, on the ground that the plea of *plene administravit* merely related to the time of the plea pleaded, and because the defendant might have paid debts upon simple contract without suit after the writ purchased, and before plea. (a)

(a) In *Platt v. Robins and Stewart*, (1 *Johns. Cases*, 276.) it is said that the plea of *plene administravit* is an affirmative plea, and that the *onus probandi* lies on the defendant. The above, being a negative plea, throws the burden of proof on the plaintiff.

*The only difficulty I feel in this case relates to that part of the plea which states, that on the day of the plaintiff's exhibiting his bill, the defendant had no goods or chattels, &c. If this refers to the filing the declaration, I should hold the plea to be bad. The cases which bear on this point are *Carpenter v. Butterfield*, (3 Johns. Cases, 145.) *Lowry v. Lawrence*, (1 Caines, 70.) and *Bird, Savage, and others, v. Caritat*, (2 Johns. Rep. 342.) These cases abundantly establish the point, that the suing out the writ is the commencement of the suit, and that the exhibition of the bill, which the modern *English* authorities consider as the commencement of the suit, is not so with us. (a)

It is, however, very usual in practice to refer, in pleading, to the exhibition of the bill as equivalent to saying the commencement of the suit; and I should be inclined to consider it, unless specially demurred to, as tantamount to saying the commencement of the suit, or suing out the plaintiff's writ, and to hold the party to proof accordingly. On the whole, we are of opinion that judgment must be entered for the defendants, with leave to plaintiff to amend, on payment of costs.

Judgment for the defendants.

(a) The words, "on the day of exhibiting the bill of the said *A. B.*," are used only when the suit is in the Court of K. B., and *by bill*, as it is called, which is peculiar to that Court, referring to the *plaint* or *original bill* filed, or supposed to be filed, by the plaintiff, on which the *process* to bring in the defendant is founded; but where the suit is by *original writ*, or in the Court of C. P., the proper words of the plea are "at the time of the commencement of the suit." Those *English* authorities, therefore, which confound the *original bill* in K. B. with the *declaration* filed after the return of process, or the *bill* in particular cases, as against *attorneys, prisoners, &c.*, cannot be correct. (Vide 3 Johns. Cases, 150. *per Radcliff, J.* 1 Sellen Pr. 28. 36.)

*DUFFIE against HAYES.

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THIS was an action of assumpsit, on a charter-party not under seal. The cause was tried before Mr. J. Spencer, at the New-York sittings, in April, 1817.

The essential parts of the charter-party were as follows:—"This charter-party of affreightment, made at the city of *Santo Domingo*, this 30th day of *December*, 1815, between *F. Dumas* and Capt. *Asa Winslow*, agents for *Cornelius R. Duffie*, (the plaintiff,) merchant in *New-York*, and owner of the schooner *Jane*, on the one part, and *Walter C. Hayes*, (the defendant,) of the city of *Baltimore*, on the other part, witnesseth, that the said *F. Dumas* and *Asa Winslow*, by these presents, do agree to

Where the whole of a vessel is chartered to take a cargo at certain specified rates, per ton, square foot, &c., if the freighter does not furnish a full cargo, the owner of the vessel is entitled to freight, not only for the cargo actually put on board, but also for what been furnished

the vessel could have taken, had a full cargo

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freight unto the said *Walter C. Hayes*, the hull of the schooner *Jane*, burthen tons, whereof *Asa Winslow* is master. In consideration whereof, the said *Walter C. Hayes* binds himself to pay forty dollars per thousand feet of mahogany, according to the invoice measurement in *Santo Domingo*; ten dollars per ton of fustic and lignumvitæ. On the said amount to be paid, 225 dollars now, and the rest in *New-York*, by satisfactory endorsed notes at sixty days. It is further agreed, that each party shall pay one half of the expenses of the laborers; and the pilot and grass-ropes shall be on the vessel's account. The provisions for the pilot and laborers on the coast, shall be also on the vessel's account. The schooner *Jane*, being ready for sea, will proceed to the coast, and there remain fifteen days, to receive her cargo. It being understood that in case of any more detention than fifteen days, it will be on *Walter C. Hayes's* expense, for the wages of the laborers, &c."

After the execution of the charter-party, a quantity of mahogany, fustic and log-wood was put on board of the *Jane*, a the city of *Santo Domingo*, by direction of the defendant. The schooner then proceeded to the coast to a place called *Macca-rees*, whither the defendant also came, and a further quantity of mahogany was taken on board, and when the defendant *left the place, one *Vittoria* acted as his agent, by whose direction the vessel went to another place, named *Comayas*, where some more mahogany was put on board by *Vittoria*, but not enough to complete her lading. *Vittoria* declared that he had no more to put on board, and no more being offered, the vessel proceeded to *New-York*, not more than two thirds laden. The defendant had paid for the cargo actually brought, and the plaintiff claimed in this action additional freight for what the vessel could have brought, had she been fully loaded. The plaintiff having proved the amount in which the cargo was deficient, the jury found a verdict in his favor, subject to the opinion of the Court, whether, on the facts of the case, and the pleadings, he was entitled to recover, or whether the judgment should be arrested, or a verdict entered for the defendant.

S. W. Jones, for the plaintiff, contended, that the entire vessel being let to the defendant, the plaintiff was entitled, by the true construction of the contract, to be paid a full freight, according to the rate stipulated in the charter-party. Charter-parties, like other mercantile instruments, are to be liberally construed. (*Abbott*, part 3. ch. 1. s. 11.) It is manifest that it was the intention of the parties, that the vessel was to take a full cargo, and that the plaintiff was to be paid for as many tons as she could carry. The captain demanded a full cargo; and after waiting the 15 days stipulated for that purpose, he departed, with the consent of the defendant's agent.

As to the ground of arrest for any supposed default in the pleadings, that is cured by the verdict. The action ought to be

in the name of the real owner, or person beneficially interested, not in that of the agent or attorney. (*Bogart v. De Bussy*, 6 *Johns. Rep.* 94. *Gunn v. Cantine*, 10 *Johns. Rep.* 37.)

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Sampson, contra, insisted, 1. That by the terms of the contract, there was no engagement on the part of the defendant to fill the vessel. Her burthen is not specified, and if neither party knew her capacity, how could the defendant stipulate to fill her up? Every thing must be expressed; and *nothing is to be admitted by implication. (2 *Lev.* 124.) *Abbot* (part 3. ch. 1. s. 3.) states the ordinary covenants and stipulations in a contract by charter-party. He says, "Sometimes also the freight is expressed to be a certain sum for every ton, cask, or bale of goods put on board, in which case the merchant usually covenants not to put on board less than a specified number of tons, casks, or bales." It is true, that the construction ought to be liberal; yet it must not be inconsistent with the plain and obvious meaning of the terms of the contract. (*Abbot*, part 3. ch. 1. s. 18. 1 *Esp. N. P. Cases*, 367. *Cook v. Jennings*, 7 *Term Rep.* 381.)

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If an entire ship be hired, and the burthen thereof expressed in the charter-party, and the merchant covenant to pay a certain sum for every ton, &c., of goods which he shall lade on board, but does not covenant to furnish a complete lading, the owners can only demand freight for the quantity of goods actually shipped. (*Abbot*, part 3. ch. 7. s. 2.) *Molloy* (b. 2. ch. 4. s. 8.) says, that "if a ship be freighted by the ton, and she is fully laden according to the charter-party, the freight is to be paid for the whole; otherwise, but for so many tons as the lading amounted to." Again; "If a ship be freighted and named to be of such a burden, and being freighted by the ton, shall be found less, there shall no more be paid than only by the ton for all such goods as were laden aboard." (*Roccus, Ingers.* trans. n. 72, 73, 74, 75. *Straccha*, p. 3. n. 11, 12. *Malyne*, 100.)

If the plaintiff has any right of action against the defendant, it must be for not filling up the vessel; not for the freight for goods he never carried. In *Ritchie v. Atkinson*, (10 *East*, 295.) where the charter-party expressed the ship to be of the burden of 400 tons or thereabout, and was to proceed to *St. Petersburg*, and there load from the factors of the defendant a complete cargo, &c., and deliver the same at *W.* and *L.* on being paid so much *per ton*, &c., the Court of K. B. held, that the delivery of a complete cargo was not a condition precedent, but that the plaintiff might recover freight for a short cargo, at the rate *per ton* stipulated, and that the freighter had his remedy for the imperfect or short delivery.

*2. The contract is between *Dumas* and *Winslow* of the one part, and *Hayes* of the other. The action, therefore, should have been brought in the names of the contracting parties. (*Abbot*, part 3. ch. 1. s. 2. 2 *Inst.* 673. 2 *Lev.* 74. 3 *Lev.*

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138. 1 *Chitty*, Pl. 4.) I consider it as an instrument under seal; but whether sealed or not, the construction is the same (1 *Term Rep.* 678. 1 *Chitty*, Pl. 24. 5 *East*, 148. 5 *Johns. Rep.* 239.)

Again; the master ought to have made a regular protest; or if no proper officer at the place, then at the first place he could. (*Malyne*, 98. *Abbot*, 315. 2 *Dallas*, 196.)

3. The breach set forth as a cause of action is uncertain, as it does not state the sum of money due. (*Comyns*, Dig. Pl (C. 47.) (C. 79.) 3 *Caines*, 73. 9 *Johns. Rep.* 291.) This defect is not aided by the verdict; for want of certainty is not helped by the verdict. (1 *Chitty*, Pl. 192. 1 *Sid.* 440.)

S. Jones, jun., in reply, said, that a protest by the master was a very proper act on his part; but it was not considered indispensable, or as a necessary prerequisite to an action.

This is not an instrument under seal, for though it is expressed to be signed and sealed by the parties, there is nothing but a flourish of the pen to their names. It is a memorandum of a mercantile contract; and the act of a commercial agent is always regarded as the act of his principal. If the suit had been brought in the name of the agent, there would have been much stronger ground for objection.

The defendant hired the entire vessel: he might use her as he pleased. He might fill her up or not. Still he must be liable for the full freight. The contract is not to pay so much for every thousand feet of mahogany to be laden on board. Two hundred and twenty-five dollars were to be paid down, and the residue in *New-York*. This shows clearly that the parties must have had in view a full freight. *Abbot* (part 3. ch. 7. s. 2.) says, "If a certain sum be stipulated for every ton, or other portion of the ship's capacity, for the whole voyage, the payment must be according to the number of tons, &c., which the ship is proved capable of containing, without regard to the quantity actually *put on board by the merchant;" and he cites *Roccus* (a) (n. 72. 75.) as an authority for that position; and the case of *Westland v. Robinson*, (2 *Vern.* 212.) where a ship hired to go beyond sea to bring home a cargo for which a certain rate per ton was to be paid, was forced to return in ballast, the mer-

(a) *Naulum debetur juxta conventionem, et stallis etiam debentur; ut si navis duo millium amphorarum capax conducta sit pro scutis mille, clarum est, mille deberi, etiam si navis capax non fuerit tot amphorarum, legem enim conventionibus contrahentes dant, et vectura navis juxta conventionem, quibus conventio facta fuerit solvenda est.* (n. 72.)

Locata navi non ad corpus navis, sed ad numerum amphorarum, vel sarcinularum, et promissa vectura pro qualibet sarcinula, pro illis tantum amphoris, vel sarcinulis impositis vectura debetur. (n. 73.)

Conducta vero navi certa, et expressa vectura, relata ad ipsam navim, non adjecto numero amphorarum, vecturam integram deberi, neque inspiciendam esse capacitatem navis,—secus est si promissa sit vectura ad rationem scutorum duorum pro qualibet sarcinula, nam pro his tantum sarcinulis, quae imponderentur, vectura debetur. Idem etiam conducta nave simpliciter, in dubio naulum solvitur pro moeribus, quae imponderentur tantum. (n. 75.)

chant's factor having no goods to put on board, and the Court of Chancery decreed payment of the freight. In conformity to this principle, the *French Ordinance* (Liv. 3. tit. 3. art. 2.) directs, that if the ship be freighted by the great, and the merchant does not furnish a full lading, yet the master shall not, without his consent, take in other goods, to complete the lading, nor without accounting to him for the freight of such goods. (*Pothier, Chart. Part. n. 20. Abbot, part 3. ch. 1. s. 8.*)

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Per Curiam. This was an action of *assumpsit* on a charter-party; and the plaintiff claims freight for as much mahogany, fustic, and lignumvitæ, as could reasonably be carried in the hull of the schooner *Jane*; and the defendant contends that, by the terms of the contract, he was bound only to pay at the rate of 40 dollars per 1,000 feet, for mahogany, and 10 dollars per ton, for fustic and lignumvitæ *actually laden* on board the vessel; that it was optional with him (the defendant) to put as *much*, or as *little*, on board as he pleased; and that the amount of freight was to be according to the quantity put on board, and not according to the capacity of the vessel.

*There was, also, a motion in arrest of judgment; but the want of special averments in the declaration, (if any such defect,) is cured by the verdict. (a)

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The only real question is upon the legal import of the contract.

The jury allowed the plaintiff's full claim for freight, according to the capacity of the hull of the vessel, the defendant having laden her *in part only*; and we are clearly of opinion, that they adopted the true construction of the contract. The plaintiff is, accordingly, entitled to judgment upon the verdict.

Judgment for the plaintiff.

(a) *Owens v. Morehouse*, 1 Johns. Rep. 276. *Bartlett v. Crozier*, supra, 250.

PENoyer and LUFF against HALLETT.

THIS was an action of *assumpsit* for the freight of goods laden on board the schooner *Three Sisters*, on a voyage from New-York to St. Bartholomews. The cause was tried before Mr. J. Van Ness, at the New-York sittings, in December, 1816.

The plaintiff produced in evidence an agreement or charter-party, not under seal, dated the 19th of July, 1815, which was as follows:—"I agree to charter of Robert M. Penoyer and Co.

Where a vessel is chartered for a voyage out and home, for an entire sum of money, to be paid on her return, her return is a condition precedent to entitle the owner to freight; and if she is lost before commencing the homeward voyage, he can recover neither on the charter-party nor on an implied *assumpsit* for the freight of the outward voyage; nor, if the freighter had accepted the outward cargo, would he be entitled to a *pro rata* freight

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(the plaintiffs) the schooner *Three Sisters*, Captain *William Reynolds*, of and about one hundred tons, to proceed to *St. Bartholomews*, and also to *St. Kitts*, if required. If she goes to *St. Kitts*, I agree to be accountable for all damages arising from seizure or detention by the *British* government. I am to have thirty running lay days to load and unload, and I agree to allow fifteen dollars per day demurrage after that time; to pay for the whole of the vessel, cabin and deck included, for the voyage out and home, fifteen hundred dollars, at the return of the vessel, in current money of our banks. I agree to pay all port charges, &c. &c." Signed by the defendant. "We have chartered to *Abraham S. Hallett* (the defendant) the schooner *Three *Sisters*, Captain *William Reynolds*, for the voyage above stated, on the terms therein mentioned." Signed by the plaintiffs.

The schooner was loaded by the defendant, who gave a letter of instructions to the master, directing him, on his arrival at *St. Bartholomews*, to go on shore and call on *William Cock*, and inquire if he had any directions from *John R. Thurston* respecting the cargo; if not, that he should then anchor in *St. Bartholomews*, without entering vessel or cargo, and write to *Thurston*, at *St. Kitts*, and await his orders. The master, accordingly, on his arrival at *St. Bartholomews*, called on *Cock*, who not having any directions from *Thurston*, he wrote to *Thurston*, but never received any orders from him. On the 29th of August, 1815, the vessel still lying at *St. Bartholomews*, with her cargo on board, there came on a violent hurricane, by which she was driven on shore, bilged and sunk, and her cargo greatly damaged. The master then called again upon *Cock*, to know what was to be done, and *Cock* told him that he would, under the circumstances of the case, take charge of the cargo; and he accordingly entered it at the custom-house, paid the duties, received it on its being landed, and advertised it for sale at auction. A short time before the sale, *Thurston* arrived at *St. Bartholomews*, attended the sale, and purchased a considerable part of the cargo. It did not appear that *Cock* was the agent of *Thurston*, or that *Thurston* interfered in the disposal of the cargo, otherwise than by buying at the sale.

The judge was decidedly of opinion, that the plaintiffs could not recover: he, however, permitted them to take a verdict, subject to the opinion of the Court, for the amount of freight for the outward voyage, as estimated by the jury.

M. S. Wilkins, for the plaintiffs. *St. Bartholomews*, under the circumstances, was the port of delivery: the vessel was not to proceed to *St. Kitts*, unless required; and she was not required to go there. Then, we say, here was a delivery of the cargo at *St. Bartholomews*, which entitles the plaintiffs to the freight *pro rata*. There was an indispensable necessity for landing the cargo; and *T.*, the agent of the defendant, *who arrived a day before the sale, having become the purchaser of

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it, it is tantamount to a delivery to the defendant himself. There has been no default on the part of the plaintiff or the master: if any damage or loss has arisen, it has been occasioned by inevitable accident. (*Griswolds v. N. Y. Ins. Co.* 3 *Johns. Rep.* 321. 323. *Luke v. Lyde*, 2 *Burr.* 886. *Beawes L. M.* 87, *Abbott on Ships*, &c. 277, 284. part 3. ch. 7 s. 5. s. 12, 13, 14, 15. *Jeremy's Law of Carriers*, 87.)

Again; the seamen were entitled to their wages at *St. Bartholomews*; (*Lord Raymond*, 639. *Abbott*, 430. part 4. ch. 2. s. 4.) and this must be on the principle that freight has been earned.

Slosson, contra. The right of the plaintiffs to recover, in this case, must depend on the contract, and its legal construction. The agreement is to pay for the whole vessel, for the voyage out and home, 1,500 dollars at the return of the vessel. The freight is entire for an entire voyage, and the return of the vessel to *New-York* is a condition precedent to a right to freight. The entire voyage must be performed before any freight is due. *Barker v. Cheriot* (2 *Johns. Rep.* 352.) is a strong case in point.

This is not a case of *pro rata* freight, which is due only where there is a contract for the transportation of goods, which, by some intervening and inevitable accident, is dissolved, and the goods are accepted at an intermediate port; there an implied promise is raised to pay freight for the transportation *pro rata*. Here is a contract for the hire of a vessel for an entire voyage, and for a gross sum. But admitting that it was a case of *pro rata* freight; the plaintiffs have not shown themselves entitled to it. There has been no voluntary acceptance by the defendant at the intermediate port. *Cock* was not the agent of the defendant. He interfered from necessity, and acted for the owners. There is no proof that the proceeds ever came to the hands of the defendant. (*Mar. Ins. Co. v. U. Ins. Co.* 9 *Johns. Rep.* 190. *Scott v. Libby*, 2 *Johns. Rep.* 336. *Osgood v. Groning*, 2 *Campb. N. P. Rep.* 466.)

**D. B. Ogden*, in reply. The agreement was to carry a cargo; but taking it as stated by the other side, it was a contract to go to *St. Bartholomews*, and, if required, to *St. Kitts*, and back to *New-York*. All that the plaintiffs were bound to do, in the first instance, to entitle them to freight, was to go to *St. Bartholomews*. The defendant was to pay all port charges. There were two distinct voyages. The case of *Mackrell v. Simond and Hankey* (*Abbott on Ships*, 316. part 3. ch. 7. s. 19.) is in point for the defendant. There was a charter, by the month, for such time as the vessel should be employed in performing a voyage from *London* to *Plymouth* and the island of *G.*, and from thence back to *London*. The freight was to be paid at the rate of 110*l.* per month, for the time taken up in

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performing the voyage, to commence at the date of the charter party, and to end "on the day of the discharge of the homeward cargo, at *London*, and to be paid one third part thereof on her report inwards at the custom-house, *London*, and the remaining two thirds thereof in two calendar months, next following." After delivering a cargo at *G.*, and while on her return to *London*, the ship was lost by tempest. Lord Mansfield says, "If the ship be cast away on the coast of *England*, and never arrive at the port of *London*, yet if the goods are saved, freight shall be paid, because the merchant receives advantage from the voyage. This is not expressed by the charter-party, but arises out of the equity of the case." In the present case, the 1,500 dollars freight was to be paid on the return of the vessel. It is not said that it is to become due on the return of the vessel. This case is distinguishable from that of *Barker v. Cheriot*. The defendant there covenanted to pay freight, 4,500 dollars, for the entire voyage, for which he was to give a note, payable in 60 days after delivery of the return cargo in the port of *New-York*.

SPENCER, J., delivered the opinion of the Court. Two questions arise:—1. Could the plaintiff recover on the charter-party? If not, 2. is he entitled to a *pro rata* freight on the outward cargo?

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*The case of *Barker v. Cheriot* (2 Johns. Rep. 352.) decides the first point. In that case, a vessel was chartered for a voyage from *New-York* to *Martinique*, and back to *New-York*, for the entire sum of 4,500 dollars, payable 60 days after the delivery of the return cargo at *New-York*. The outward cargo was delivered at *Martinique*, and while on the return voyage, with a cargo, she was captured and carried into *Antigua*, where the cargo was libelled and ordered to be retained for further proof. The vessel returned to *New-York* without the goods, except a few articles left on board. The goods were afterwards ordered to be returned to the claimants, but neither the goods nor proceeds ever came to the hands of the owners or insurers. The Court held, that it was one entire voyage from *New-York* to *Martinique* and back again; and that, as the vessel was captured on her return, and did not deliver the return cargo, no freight was due, notwithstanding the defendant had the benefit of the outward voyage; because, by the express agreement of the parties, the outward and homeward voyage were one, and the profit depended on the entire performance. The same principle was recognized in *Scott v. Libby and others*, (2 Johns Rep. 340.)

The present case presents an entire contract. The vessel was chartered to proceed from *New-York* to *St. Bartholomews*, and, if required, to *St. Kitts*, and back to *New-York*; and the defendant agreed to pay 1,500 dollars for the vessel, for the voyage out and home, on her return to *New-York*. The return of

the vessel, therefore, is a condition precedent, and not having been performed, it is impossible to say that the plaintiff can sustain his action on the charter-party.

The counsel for the plaintiffs pressed upon the Court the case of *Simond and Hankey*, stated in *Abbott* (318.) That case differs materially from the present; and Lord *Mansfield*, in giving his opinion, says, "If there be one entire voyage out and in, and the ship be cast away on the homeward voyage, no freight is due, no wages are due, because the whole profit is lost, and by express agreement the parties may make the outward and homeward voyage one." The case of *Byrne and others v. Pattinson*, cited by *Abbott*, (319.) is one very analogous to the present, and it received a decision *in accordance with that in *Barker v. Cheriot*. The case of *Liddard v. Lopes* (10 *East*, 529.) further illustrates the correctness of the decision in *Barker v. Cheriot*. In that case, Lord *Ellenborough* observed, "The parties have entered into a special contract, by which freight is made payable in one event only,—that of a right delivery of the cargo according to the terms of the contract,—and that event has not taken place: there has been no such delivery, and, consequently, the plaintiff is not entitled to recover; he should have provided, in his contract, for the emergency which has arisen."

Had the defendant himself accepted the outward cargo at *St. Bartholomews*, it would not have entitled the plaintiff to a *pro rata* freight, because of the entirety of the contract; but in the present case, it does not appear that *Cock*, who caused the cargo to be sold, had any authority to do so: he acted from the necessity of the case.

It is impossible to raise an implied promise to pay the outward freight, on the ground of the labor performed in carrying the defendant's goods, when the carriage of the goods was regulated by a contract, part of which only was performed, and the other part remained unperformed; the entire performance of it being a condition precedent.

Judgment for the defendant.

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A bill of exchange was drawn by the defendant on A., in favor of B., who sold it to the plaintiff. A., who resided in England, accepted the bill, but did not pay it; and it was returned to the plaintiff protested. The plaintiff then drew a bill upon A. and the defendant, jointly, for the amount of the former bill, with damages, which was accepted by A. only, but was not paid. Held, in an action against the defendant, as drawer of the first bill, that he was not discharged by A.'s acceptance of the second bill.

Where a bill of exchange was drawn here upon a person in Great Britain, during the late war with that country, for supplies furnished

[* 339] by the payee to a British vessel, authorized, by act of Congress, to sail from here to an enemy's port, which was sold by the payee to the plaintiff, who remitted it to Great Britain for collection, it was held that the remittance of the bill was within the protection afforded to the original transaction, and was not illegal. (a)

An objection not taken at the trial cannot be raised on the argument of the case at bar.

*SUCKLEY against FURSE.

THIS was an action of *assumpsit* on a bill of exchange, dated at New-York, the 7th of November, 1812, drawn by the defendant, on Edward Angove, of Falmouth, in England, in favor of Taylor and Newman, or order, for 331l. 3s. 6d. sterling, payable in London, thirty days after sight, and endorsed by Taylor and Newman, to the plaintiff. The cause was tried before Mr. J. Spencer, at the New-York sittings, in April, 1817.

The defendant was captain of the British packet *Swiftsure*, and Taylor and Newman, as his agents, furnished the packet with supplies, a short time before the date of the bill, by the permission of the collector of the port of New-York, and the defendant drew the bill on account of these supplies, and sold it to the plaintiff, who had no concern in the transaction for which it was given. The bill, on being transmitted to England, was accepted by Angove, on the 5th of January, 1813, but, not being paid, was returned protested to the plaintiff, who thereupon drew a bill on the defendant and Angove jointly, for the amount of the former bill, with twenty per cent. damages, at 60 days after sight, in favor of Thomas Holy, who was a partner of the plaintiff, and resided in England. The second bill was accepted by Angove, but not by the defendant, and was returned to the plaintiff unpaid.

The defendant's counsel objected, that the acceptance of the second bill by Angove only, was a discharge of the drawer of the first bill, which objection was overruled by the judge, who, however, permitted the point to be reserved, and a verdict was accordingly taken for the plaintiff, subject to the opinion of the Court on a case made, containing the facts above stated.

Slusson, for the plaintiff. The only question is, whether, *by the acceptance of the second bill, the drawer of the first bill was discharged. He could be discharged on two grounds only, either by the second bill being a satisfaction of the first; or by the holder giving a new credit, by extending the time of payment. 1. Taking a second bill is no payment or satisfaction of the first, or original debt. (*Murray v. Gouverneur and Kemble*, 2 Johns. Cases, 438. *Tobey v. Barber*, 5 Johns. Rep. 68. *Johnson v. Weed*, 9 Johns. Rep. 310.)

2. It is manifest that there was no intention on the part of the plaintiff to waive his right to recover against the defendant as drawer of the first bill. The second bill was not drawn to obtain payment of Angove only, but of the defendant also. The acceptance of the second bill, by A. alone, was a dishonor

(a) Vide *N. Y. Equitable Ins. Co. v. Langdon*, 6 Wendell, 623.

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of the bill, for it was not accepted according to its tenor. (*Chitty on Bills*, 127. 2d ed.) Giving time, or taking security of the acceptor, does not discharge the drawer, if he has no effects in the hands of the drawee, and notice of non-payment is not necessary in that case. (*Chitty on Bills*, 213. 2 *Exp. Rep.* 516, 517. 1 *Bos. & Pull.* 652. *Hoffman v. Smith*, 1 *Caines*, 157.) (a)

Again; the plaintiff is not bound by the act of an agent who exceeded his authority; *Holy* had no authority to receive the acceptance of *A.* alone.

T. A. Emmet, contra. *Holy* was not an agent, but a party equally interested with the plaintiff. They were partners.

In *Gould v. Robson and another*, (8 *East's Rep.* 576.) where the holder of a bill, which had been accepted, agreed to draw a new bill on the acceptor, at a future date, and to keep the original bill as security, it was held to be such a giving of time and new credit to the acceptor, as discharged the endorser, though the drawer had no effects in the hands of the acceptor. (*Withall v. Masterman*, 2 *Campb. N. P.* 579. *Tindall v. Brown*, 1 *Term Rep.* 167. 3 *Bro. C. C.* 1 *Chitty on Bills*, 212.) (b)

*There is another objection to the plaintiff's recovery. The remitting the bill to *England*, during war, was illegal; but as the effect of the war on the contracts of our citizens has been so fully discussed in a case lately argued and decided, (c) it is unnecessary to argue the question here. The cases mentioned by *Chitty* (*L. of N.* 17. 27.) are exceptions, and recognize the general rule. The plaintiff had no concern in furnishing the supplies to the *British* packet. The bill was drawn to place funds in *England*, and was a distinct transaction.

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Slosson, in reply, said, that as to the suggestion that *H.* was a party in interest, and not an agent, the fact was settled by the finding of the jury.

As to the second point; on the declaration of war, an act of Congress was passed, (6 *July*, 1812. 18 *Cong.* 1 sess. ch. 129. s. 5.) which allowed *British* packets which had sailed before *September* to be received into our ports. The *Swiftsure* was admitted into our ports, under the act. She was exempted from the operation of war; and it was lawful to furnish her with supplies, and to receive payment for them. The bill drawn by the defendant was a good bill. It makes no difference whether the bill was remitted by the payees or by the plaintiff. The objection applies equally to both. Unless the bill could be ne-

(a) Vide *Collet v. Haigh*, 3 *Campb. N. P.* 282. *Walwyn v. St. Quintin*, 1 *Bos. & Pull.* 652. *English v. Darby*, 2 *Bos. & Pull.* 61. *Bridges v. Barry*, 3 *Trunt.* 130. *Raggardi v. Azmore*, 4 *Trunt.* 730.

(b) *Bishop v. Rowe*, 3 *M. & Selw.* 312.

(c) *Grinould v. Waddington*, ante, p. 57.

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gotiated by the payees, it was of no value. The payees could not go to *England* to receive the money with their own hands. In *Kensington v. Inglis*, (8 *East*, 273.) where an enemy's ship was licensed to bring certain goods from the enemy's country, belonging to *British* subjects, the insurance of those goods by the owners in *England* was held to be legalized, and the insured might maintain an action on the policy.

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YATES, J., delivered the opinion of the Court. There can be no doubt but that the law discharges the endorser of a bill of exchange, when the holder gives time to the acceptor after it has been dishonored. (1 *Term Rep.* 167. 8 *East*, 576.) but this is not such a case: here, the bill having been *dishonored, and notice duly given, *Suckley*, the holder, draws for the amount of the first bill, with damages and charges, on *Furse*, the drawer, and *Angove*, the acceptor of that bill, jointly, at 60 days sight, in favor of *Thomas Holy*, which was accepted by *Angove*, but not by the defendant, *Furse*. This bill was afterwards returned, and never paid, so that without adverting to a partnership between them, on the face of the transaction, it is evident that the intention of the plaintiff was, that the sixty days should be given for payment, provided both accepted; and then it could not have affected the plaintiff's remedy against either. From the knowledge both had of the original transaction, it must be presumed that they knew that no greater or other power or authority had been conferred on *Holy*, the agent: his act, therefore, in taking the acceptance of *Angove* alone, did not bind the plaintiff, and, consequently, could not discharge the liability of *Furse*, as drawer of the original bill, on the ground of an agreement for an extension of time of payment, or the giving of a new credit. No such agreement had ever existed between the parties. It was evidently sent to *Holy* for collection only. To discharge an endorser, even, an express agreement must be shown. The case of *Gould and others v. Robson* (8 *East*, 576.) is such a case. There the holder of the bill had taken part payment from the acceptor, and agreed to take a new acceptance from him for the remainder, payable at a future date. The new bill here was drawn without any agreement, and, being for an existing debt, could not affect the original liability of *Furse*; for it is a settled rule of law, that a bill shall not be a discharge of a precedent debt, unless it be so expressly agreed between the parties. In *Clark v. Mendel*, (1 *Salk.* 124.) it is stated, that if part be received, it shall only be a discharge of the old debt for so much. And Lord *Kenyon* (1 *Esp. N. P. Cases*, 3 *Stedman v. Gooch*.) says, "that if, in payment of a debt, the creditor is content to take a bill or note, payable at a future day, he cannot legally commence an action on the original debt until such bill or note becomes payable, or default is made; but if such bill or note is of no value, as if, for example, it be drawn on a person who has no effects *of the drawer in hand, and who,

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therefore, refuses it, in such case he may consider it as waste paper."

The plaintiff's right of action, then, against the drawer, was not affected by the second bill. But another objection to the verdict has been made on the argument—that the remitting of the bill to *England*, in time of war, was illegal, and that no action against the defendant could grow out of such illegal act.

As to this objection, it might be observed, that it does not appear by the case, that the illegality of remitting the bill was adverted to by the defendant's counsel at the trial, which might, perhaps, now be deemed sufficient to conclude the party; but if the objection had been made, it would have been of no avail. The act of Congress of the 6th of *July*, 1812, (1 session, 12th Cong. chap. 129.) authorizes vessels of this sort to sail to the enemy's port, and, of course, those who afford the necessary supplies to the captain, for a voyage thus legalized, are exempted from the controlling principles growing out of a state of war. The same protection afforded by law to *Taylor* and *Newman*, who procured the supplies, must be extended to *Suckley*, and to all those having dealings of the same description. The case of *Kensington v. Inglis and another* (8 *East*, 273.) goes much further, and appears to me to be conclusive on the subject. There a license had been given to trade with an alien enemy for specie and goods, to be brought from the enemy's country in his ships, into a *British* colonial port; and it was held, that an insurance on the enemy's ship, as well as on the goods and specie put on board, was incidentally legalized; and that it was competent for the *British* agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war, the trust not contravening any rule of law or of public policy. In this case, the privilege to sail clearly comprehended the right of procuring and affording the necessary supplies, to enable her to prosecute her voyage, for the amount of which the bill in question was drawn. The plaintiff, therefore, on both grounds, is entitled to judgment on the verdict.

Judgment for the plaintiff.

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*SMITH, *ex dem.* ROOSEVELT and others, against VAN DUSEN.

Where an officer in the New-York line, during the revolutionary war, died in 1781, having devised all his real and personal estate to his father; and in 1790, a patent was issued to the testator for a military lot; and after the death of the father, the only brother of the testator, in 1811, entered upon the lot, and in 1814, conveyed part of it to A., under whom the defendant claimed, it was held, that the title to the lot was vested in the testator at the time of his death, and that he might devise it; that his father was entitled to it, both as the devisee, and as the heir of his son, and having conveyed it, in 1794, the lessors of the plaintiff, who claimed under that conveyance, were entitled to recover it in an

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action of ejectment against the defendant, claiming under the conveyance from the testator's brother.
A devise of land held adversely to the devisor is void; but it descends to his heir. (a)

THIS was an action of ejectment, for part of lot No. 60, in the town of *Mentz*, in *Cayuga* county. The parties agreed upon a case, containing the following facts, for the opinion of the Court.

Peter Elsworth, an officer in the *New York* line during the revolutionary war, and, as such, entitled to bounty land, made and published his last will and testament, dated *May 2d*, 1781, by which he devised all his real and personal estate, whatsoever, or wheresoever, to his father, *William Elsworth*, whom he authorized and directed to sell his real estate, and appointed him his sole executor. *P. Elsworth* died in the same year, without lawful issue, leaving his father, *W. Elsworth*, and a brother, *Theophilus Elsworth*. Letters patent, bearing date the 7th of *July*, 1790, were afterwards issued to *Peter Elsworth*, for a military lot, which, by deed bearing date the 11th of *October*, 1794, *W. Elsworth* conveyed to *Christopher Tapven*, in fee, who, by deed of the third of *October*, 1794, conveyed the same to *Cornelius C. Roosevelt*. *Roosevelt* died on the 10th of *February*, 1814, having devised the lot to *Eliza Evertson* and *Sarah Roosevelt*, two of the plaintiff's lessors, his heirs at law. *William Elsworth*, the father of the patentee, died in *October*, 1799, and after his death, in 1811, *Theophilus Elsworth*, the brother, entered into possession of the lot, his being the first actual possession, and died in possession, except of 200 acres, the premises in question, having, in *May*, 1806, conveyed them to *Yeomans*, who, in 1814, conveyed the same to *Comb*, who, by deed bearing date the 28th of *August*, 1815, conveyed the same to the defendant. The defendant entered into possession, and continued in possession until after the bringing of this suit.

Griffin, for the plaintiff, contended, that the lands claimed, upon the death of *Peter Elsworth*, vested in his father, either as devisee, or heir at law. He cited *Powell on Devises*, 236. 1 *N. R. L.* 313. sess. 36. ch. 80. s. 7. sess. 29. ch. 83. s. 8. *Webster's Ed.* vol. 3. 399. *Jackson v. Phelps*, 3 *Caines*, 62. *Jackson v. Winslow*, 2 *Johns. Rep.* 80.

Sudam, contra, insisted, that the lots in question did not pass by the will of *P. E.* in 1781, as his right to the land rested on the resolutions only of the legislature. The act of 1790 refers only to cases of soldiers dying since 1783; and the act of 1783 gives the seisin at the time of the death. But to render the will valid, there must have been a seisin at the time of the devise.

(a) Vide *Varrick v. Jackson*, 2 *Wendell's Rep.* 166. *S. C.* 7 *Con. Rep.* 238. *Wilkes v. Lion*, 2 *Conen*, 333. *Jackson v. Waring*, 1 *Peters's Rep.* 570.

Again ; the act of 1790 does not affect this case, because *P. E.* died before 1783, and the act of 1803 does not affect the title of his brother, *Theophilus*, because his father died in 1799.

T. E. took the land on the death of *P. E.*, as heir to his deceased brother. There were no intermediate heirs, and the act of 1803 has no effect on the case, as the father died in 1799. *T. E.* has always been the heir at law of the deceased soldier. Why then refer the seisin back, in order to change the descent ? This case is different from any that has yet been presented to this Court, relative to the rights of deceased soldiers. The case of *Jackson, ex dem. Austin and others, v. Howe*, (14 *Johns. Rep.* 405.) is the only one that has any bearing on the present case. All the other cases are very distinguishable from it. The Court will always favor the heir at law, and there was no period of time from the death of the soldier, that his brother, *T. E.*, was not his heir.

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SPENCER, J., delivered the opinion of the Court. It is scarcely necessary, after so many decisions upon the points arising in this case, to do more than briefly state the facts, and refer to the cases decided.

Peter E'sworth, the patentee of the lot, of which the premises in question are a part, was an officer, in the revolutionary war, in the line of this state, and as such entitled to a grant of bounty lands : the patent to him was a fulfilment, on the part of the state, of the engagement to give the lands. *He died in *May*, 1781, and by his will duly executed, he devised to his father, *William Elsworth*, all his real and personal estate whatsoever, and where-soever, and constituted his father executor. The will authorized the executor to sell and convey the real estate. The plaintiff's title is derived under a sale by the executor, and no objection is made to the plaintiff's title, if *William Elsworth* became seised of the lot, either under the will, or as heir to the patentee.

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Peter Elsworth died without issue, leaving his father and a brother, *Theophilus* : the defendant has deduced a regular title under him, if he was seised as heir of the patentee.

In the case of *Jackson v. Howe*, (14 *Johns. Rep.* 406.) *Jackson v. Phelps*, (3 *Caines*, 62.) and *Jackson v. Winslow*, (2 *Johns. Rep.* 80.) this Court decided, that by the act of the 5th of *April*, 1803, the titles to the military bounty lots were vested in the officers and soldiers, at the time of their respective deaths, without reference to the period of issuing the letters patent.

It follows, then, that *Peter Elsworth* was seised of the lot when he died, and might devise it. But the act regulating descents, adopted by the act of the 5th of *April*, 1803, in reference to these lands, would also vest the lot in *William Elsworth*, as heir to his son, the patentee ; for the lot was not held by *bona fide* purchasers or devisees under *Theophilus*, on the 5th of *April*, 1803.

The lessors of the plaintiff, *Eliza Evertson* and *Sarah Roose*

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v^{elt}, are the devisees, and also the heirs at law of *Cornelius C. Roosevelt*. The adverse possession at the time of his devising, though it invalidates the devise, does not prevent the descent

Judgment for the plaintiff.

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The testator directed, that in case of a deficiency of his personal estate, some of his real estate should be sold for the payment of his debts; he then devised his real and personal estate to his wife for life, and appointed her and another person his executors.

The widow alone undertook the execution of the will; and the testator having disposed of all his personal property in his lifetime, and dying indebted, the executrix sold and conveyed part of the real estate: Held, that the power was well executed by the executrix alone.

(a)

THIS was an action of ejectment for land in the town of *Flushing*, in the county of *Queens*. The cause was tried before Mr. J. *Van Ness*, at the *Queen's* circuit, in *June*, 1817.

The plaintiff's lessor claimed the premises as the only child and heir at law of *Gilbert Field*, who died in possession, about 28 years before the trial. After the death of her father, she married *Thomas Hunt*, who died in 1812. The defendant claimed as purchaser under a power of sale contained in the will of *Gilbert Field*, executed the 20th of *February*, 1788, and the material parts of which are as follows:—

"In the first place, I will and order that all my just debts and funeral charges be paid by my executors, hereinafter named, out of my personal estate. If there should not be enough of my personal estate, I will and order some of my real estate to be sold, for to pay my debts *Item*. I give and bequeath unto my wife, *Hannah*, the use of all my estate, both real and personal, after the payment of the debts as aforesaid, during her natural life; and, after her decease, I give and bequeath all my estate, both real and personal, unto my daughter, *Elizabeth Field*, her heirs and assigns, forever," &c. The testator appointed his wife and *Jesse Farrington* his executors; but the former only undertook the execution of the will, and on the 19th of *July*, 1790, conveyed the premises to *John Fowler*, through whom the defendant claims.

The testator, before his death, gave all his personal property to his daughter, who took away almost the whole of it when she married, leaving only some trifling articles with the widow. The testator, at the time of his death, owed some debts, though it does not appear to what amount: there were, however, his physician's bill, and some other small debts due from him, for the payment of which, with his funeral expenses, the premises in question were sold. *The testator also owned another lot in *Flushing*, which had since been sold by the lessor of the plaintiff.

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A verdict was taken for the plaintiff, subject to the opinion of the Court, on a case in which the above facts were stated.

Burr, for the plaintiff, contended, that the power to sell was a naked power; or, at most, a power to sell on a certain con-

(a) Vide *Jackson v. Given*, 16 *Johns Rep.* 167

before the happening of which the executors could not exercise the power. It should have been made clearly to appear, that there was a deficiency of personal assets, and that it was necessary to sell some part of the real estate, before the widow undertook to sell. The existence of debts, and the insufficiency of the personal assets, was a condition precedent; and, unless proved, there was no authority to sell. It belongs to the purchaser to ascertain the fact at his peril. (*Dilce v. Ricks*, Cro. Car. 335. *Culpepper v. Aston*, 2 Chan. Cas. 221. 223. *Sugden, L. of Vend.* 343, 344. 1 *Caines's Cas. in Error*, 15.)

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Brinckerhoff, contra, said, that the subject of the execution of a power given to executors to sell under a will, had lately been so fully discussed in the Court for the Correction of Errors, that it was unnecessary to repeat the arguments, or to examine the cases which had been cited. They were all to be found in the report of the case of *Franklin v. Osgood*, (2 *Johns. Chan. Rep.* 1 S. C. in Error, 14 *Johns. Rep.* 527. 560.) He contended, that it was a power coupled with an interest, and was well executed by the widow of the testator, as sole acting executrix. (*Powel on Devises*, 301. *Caines's Cas. in Error*, 15. *Co. Litt.* 113. a. 181. b. 236. a. 292. a. 2 *Ch. Cas.* 115. 220. 223. 2 *Vern.* 302. 568. 2 *Ves.* 590. *Powel on Devises*, 291. 294. 310.)

YATES, J., delivered the opinion of the Court. The principles which governed the decision of *Franklin v. Osgood*, in the Court for the Correction of Errors, (14 *Johns. Rep.* 527.) and of *Jackson v. Burtis*, in this Court, (11. 391.) are applicable to, and fully decide, the present case. The case of *Lessee of Zebach v. Smith*, (3 *Binney*, 69.) is also in point.

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The testator, in the case before us, gives the power to sell to his executors without naming them, which shows that the authority intended to be given was *virtute officii*, and it being a power to sell for the purpose of paying debts, the exercise of it was necessary to effectuate his intention. (*Pow. D. v.* 297. 307. *Cro. Car.* 382. *Cro. Eliz.* 26.) Besides, it is a power coupled with an interest. The wife, by the will, has a life estate in the premises. In short, the power contains all the requisites to show that it must have survived, and that it could not have been exercised by any person not an executor. The widow at the time of sale was the sole acting executrix; and by the statute, (21 *Hen. VIII.* ch. 4. sess. 10. ch. 47. s. 10. 3d of *March*, 1787. 1 *Greenl. ed. Laws*, 389, 1 *N. R. L.* s. 11. p. 364. 367.) (a) where any of the executors renounce or refuse to act, the rest may execute the power. There can, therefore, be no doubt that the executrix, who alone qualified, had a right to dispose of the property, and the indebtedness, to authorize the disposition of it, sufficiently appears. The testimony clearly

(a) 2 R. S. 109.

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shows that the testator, before his decease, gave all his personal property to his daughter; and that he was considerably indebted, at least for his physician's bill, and other small debts, with his funeral expenses. This is enough; and the property having been sold for its full value, at the time, there is nothing to affect or invalidate the sale made by the executrix. The defendant is, therefore, entitled to judgment.

Judgment for the defendant.

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*M'DONALD against HEWETT.

Where, after a sale of goods, some act remains to be done by the vendor before delivery, the property does not vest in the vendee, but continues at the risk of the vendor.

(1) The plaintiff and A. entered into an agreement, which stated that the plaintiff had bought of A. a certain quantity of timber, which the plaintiff was to pay for at the measurement in the city of New-York, when it was delivered and inspected; and also to pay the fair market price in New-York, when it was delivered: the plaintiff also agreed, that the amount of the timber should be endorsed on notes which he held against A., and if it exceeded the amount of the notes, the plaintiff should pay the balance to A.: it was held, that this agreement was executory, and did not vest the property in the timber in the plaintiff, who, therefore, could not maintain an action of trover against a third person for the conversion of it.

THIS was an action of trover for a quantity of timber. The cause was tried before his honor the chief justice, at the *Alban*, circuit, in October, 1817.

The plaintiff produced in evidence the following writing or bill of sale:—"Stillwater, March 16, 1816. William M'Donald bought of John Neilson, junior, 100 sticks timber, consisting partly of oak, pine, hemlock, and elm, lying on the east side of Hudson river, in the town of Easton, Washington county; also 150 sticks timber, consisting of oak and pine, lying on the bank of Hudson river, in the town of Stillwater. The said William M'Donald is to pay for the same at the measurement in the city of New-York, when the said timber is delivered and inspected, and, also, is to pay the fair market price in the city of New-York, when delivered. The said John Neilson has contracted, and does agree to deliver the same on or before the first July next; and, also, the said John Neilson, jun., agrees that the amount of the said timber shall be endorsed on his notes, which the said William M'Donald holds against him," (describing them,) "and if the said timber amounts to any thing more than the said notes, the said William M'Donald is to pay the overplus to the said John Neilson, jun." The defendant was employed by Neilson to take the timber to New-York, and on his arrival there, it was demanded of him by the plaintiff, but he refused to deliver it, and left it with the father of the plaintiff, who sold it on the plaintiff's account.

The defendant, during the course of the trial, moved for a nonsuit, on the ground that there had not been such a sale to the plaintiff as would enable him to maintain this action; and

(1) Vide *Russell v. Nicoll*, 3 *Wendell's Rep.* 112. *Outwater v. Dodge*, 7 *Cow. Rep.* 25. *Jennings v. Whiter*, *Ibid.* 259. *Rapelye v. Mackie*, 6 *Ibid.* 250. *Barns v. Graham*, 4 *Ibid.* 452. *Ward v. Shaw* 7 *Wendell*, 404.

afterwards, on the ground, that the action could not be maintained against the defendant, he being only the servant and agent of *Neilson*, and that, in fact, there was no conversion by the defendant; but the judge, in both instances, *denied the motion, and a verdict was found for the plaintiff, subject to the opinion of the Court.

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Huntington, for the plaintiff. As between the plaintiff and *Neilson*, there was such a contract of sale and transfer of the property in the timber, as would enable the plaintiff to maintain trover. There is a bill of sale, importing a consideration, and a sufficient memorandum in writing within the statute of frauds. The agreement shows that a sale has been made. (*Bac. Abr. Bills of Sale. Shep. Touchst.* 224. 1 *Comyn's Dig.* 411. Agreement. (A. 2.) 2 *Com. Dig.* 138. Biens. (D. 3.) 1 *Bl. Com.* 443. 2 *Comyn on Contracts*, 210. 7 *East*, 571. *Bull. N. P.* 35. 2 *Saund.* 47. n. b.)

The next question is, whether trover will not lie against the defendant, under the circumstances of the case. The defendant knew that the plaintiff had purchased the timber of *Neilson*. All persons who direct or assist in committing a trespass, or in the conversion of personal property, are in general liable as principals though not benefited by the act. (1 *Chitty, Pl.* 67. 2 *Saund.* 47. i. *Bull. N. P.* 41. 6 *Term Rep.* 300. 1 *Bos. & Pull.* 369. 2 *Esp. N. P. Cases*, 553. *Bac. Abr. Trover (E.)* 2 *Saund.* 47. e. f. 2 *Str.* 813. *Thorp v. Burling*, 11 *Johns. Rep.* 285. *Bristol v. Burt*, 7 *Johns. Rep.* 254. *Murray v. Burling*, 10 *Johns. Rep.* 172. 175.)

In *Perkins v. Smith*, (1 *Wils. Rep.* 328.) it was held, that trover lies against a servant who disposes of the property of another to his master's use. (*S. P. Stephens and others v. Elwal*, 4 *Maule and Schw.* 269.)

T. Sedgwick, contra. The only question is, whether the property was transferred to the plaintiff. It is an agreement containing mutual stipulations and conditions, not an absolute bill of sale. The agreement is signed by both parties, which is not the case in an ordinary bill of sale. The price was to be paid at a future day. This was an executory contract. In *De Fonclear v. Shottenkirk*, (3 *Johns. Rep.* 170.) where there was an agreement for the sale of a slave, and the defendant was to take him on trial, and while with the defendant, the slave ran away, it was held that the defendant was not liable for the loss, it not being an absolute sale.

*Again; a servant is not liable in trover: he is not bound to decide on the right of ownership, on the property being claimed or demanded by a stranger. A demand and refusal are only evidence of a conversion. There was no actual conversion in this place. (*Bull. N. P.* 47.) A servant is not answerable for negligence, but his principal only. (*Lane v. Cotton*, 12 *Mod.*

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488. 15 Vin. Abr. 316. *Master and Servant* (G.) 1 Roll. Rep 78.) *Perkins v. Smith* is very distinguishable from the present case. The defendant there was a *tort-feasor*. The bankrupt had no right to deliver the goods to him; and his selling them for his master's use, was a tortious act.

SPENCER, J., delivered the opinion of the Court. The only point is, whether the plaintiff was the owner of the timber for which the suit is brought. In construing the agreement, we must look at all its provisions. The contract *was executory, not executed*, and the property did not pass.

The agreement, to be sure, says, that the plaintiff bought of the defendant the timber lying in *Washington* and *Saratoga* counties; but how? The plaintiff was to pay for the same at the measurement in *New-York*, when it was delivered and inspected, and at a fair market price, when delivered. *Neilson* contracted to deliver it by a particular day, and the amount was to be endorsed on notes which *M'Donald* held; and if the timber amounted to more than the notes, the residue was to be paid for.

The distinction between executory and executed contracts is well defined; the former conveys a chose in action, the latter a chose in possession. In 2 Bl. Com. 443. 1 Com. on Con. 3. 3 Johns. Rep. 368. 424. 3 Johns. Rep. 44. 5 Johns. Rep. 74. 10 Johns. Rep. 336, this distinction is stated and illustrated. The usual and decisive test, in cases of this kind, is to consider at whose risk the subject of the contract was; and certainly this timber was at the risk of *Neilson*. He was to transport it to *New-York*: it was not to be delivered until inspected; and *Neilson* had the right to withhold a delivery until the amount was endorsed on his notes; and if the fair value, which was yet to be ascertained, exceeded the notes, *Neilson* had a right to insist on payment before he parted with his timber, for, by the contract, these were dependent and simultaneous acts.

The case of *Busk* and another v. *Davis* and another, (2 Maule and Selwyn, 397.) and *Shibly v. Davis*, (5 Taunt. Rep. 621.) are full to the point, that if any act remains to be done by the vendor before delivery, the property does not pass.

Judgment for the defendant

ALBANY,
August, 1818COLQUHOUN and others *against* NEW-YORK FIREMEN
INSURANCE COMPANY.COLQUHOUN
v.
N.Y. FIREMEN
INS. CO.

THIS was an action of *assumpsit* on a policy of insurance on 1,000 barrels of flour, valued at the sum insured, which was 12,768 dollars, from *Petersburgh* to *Norfolk*, on board of crafts or vessels; and at and from *Norfolk* to *Lisbon*, on board the ship *Debby and Eiza*. The policy was dated the 8th of *February*, 1813, and contained a warranty, that the vessel should have a genuine *British* license on board; and that the cargo should be in conformity to the license. The cause was tried before Mr. J. *Spencer*, at the *New-York* sittings, in *April*, 1817.

The vessel set sail on the voyage intended, on the 5th of *March*, 1813, and proceeded as far as *Hampton Roads*, when the master, understanding that the *Chesapeake* was blockaded by a *British* squadron, put back, and the voyage was discontinued; and on the 15th of *March* the plaintiffs abandoned. It was proved that the vessel had a genuine *British* license on board at the time she sailed, and until her return.

A verdict was taken for the plaintiffs, by consent, subject to the opinion of the Court, on a case in which the above facts were stated.

Where an insurance was effected during the late war with Great Britain, on goods from *Norfolk* to *Lisbon*, and the policy contained a warranty that the vessel should have a genuine *British* license on board, and the vessel sailed with, and had such license on board at the time of the loss: held, that as the taking of such license was unlawful, and subjected the vessel to forfeiture, the policy was void. (a)

T. A. Emmet, for the plaintiff.

Wells and S. Jones, jun., for the defendants.

*The counsel declined arguing the case, as the question had been before raised and discussed, but submitted it to the consideration of the Court on the facts of the case.

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SPENCER, J., delivered the opinion of Court. Whether the defence urged ought to have been set up, was a question for the consideration of the defendants only: we are called upon to pronounce the law of the case, without regard to honorary considerations.

The objection is, that the voyage was illegal; and if it be so, there is an end of the question; for any contract founded upon an illegal voyage, partakes of the character of that voyage, and stands or falls with it.

The Court do not propose, upon a case submitted by the parties without argument, to go into much discussion. By reference to the cases of the *Julia*, (8 *Cranch*, 189.) the *Aurora*, (8 *Cranch*, 219.) the *Hiram*, (1 *Wheaton*, 440.) and the *Ariadne*, (2 *Wheaton*, 147.) it will abundantly appear, that the Supreme Court of the *United States* have repeatedly decided, that the

(a) *Craig v. United States Ins. Co.* 1 *Pd. C. C. R.* 410. *The Caledonian*, 4 *Wheat.* 100. *Patton v. Nicholson*, 3 *Wheat.* 204.

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mere sailing under an enemy's license, without regard to the object of the voyage, or the port of destination, constituted, of itself, an act of illegality which subjected the ship and cargo to confiscation; that it was an attempt by one individual of a belligerent country to clothe himself with a neutral character, by the license of the other belligerent, and thus to separate himself from the common character of his own country.

This doctrine we consider sound, and not only warranted, but required, by the duty of allegiance which every citizen owes to his country. The converse of the proposition laid down cannot be endured for an instant. It would go the whole length of justifying a citizen of one of the belligerents in holding a correspondence with the enemy, and in lending himself to them in furtherance of their views, in direct hostility to the views and interests of his own government. In short, it would open the door to the most treasonable correspondence with, and aid to, the enemy.

Were it necessary to show, that, in this case, the shipment was to promote the views and subserve the interests of the enemy, the license under which the vessel sailed affords the most incontestable evidence of the fact. The Court forbear going into the evidence, as they do not found their opinion on the fact, that the voyage was undertaken to supply the enemy, but on the broad ground, that the enemy's license, *per se*, was a cause of forfeiture

Judgment for the defendants.

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JACKSON, *ex dem.* COLDEN and others, *against* CHACE.

A motion for a new trial will not be heard after a judgment has been regularly perfected; although it be on the ground of evidence newly discovered since the judgment.

MOTION to set aside the judgment, and the subsequent proceedings, and for a new trial, on the ground of newly-discovered evidence. From the affidavits which were read, it appeared, that the suit was commenced in 1807, and, after a trial and verdict for the plaintiff, judgment was entered for the plaintiff, in *October* term, 1816, there being no order to stay proceedings; but no execution was issued until some time in *July*, last past.

That the new evidence, which, it was contended, would clearly show a title to the premises out of the lessors of the plaintiff, was not known or discovered by the defendant until the 27th of *April*, last past.

Weston, for the defendant, said, that, under the particular circumstances of the case, the motion ought to be heard. In *Case v. Shepherd*, (1 Johns. Cases, 245.) the Court allowed

the motion to be made after judgment had been perfected, on the ground of a misconstruction of the rule of practice by the defendant's attorney. In *Birt v. Barlow*, (Doug. 170.) the Court of K. B. allowed the motion to be made, after the four days had expired, under the special circumstances. (*Bac. Abr. Trial*, L. 1.) In *Lof's Reports*, (160.) it is said, that it is never too late to move for a new trial on a new discovery; which will take it out of the general rule of four days, if you apply in due time after the discovery made.

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v.
SMITH.

**Mitchill and Van Vechten*, contra

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Per Curiam. A motion for a new trial must be within the first four days of the term, and before judgment is perfected, unless an order to stay proceedings on the verdict has been obtained, which operates as an enlargement of the rule of four days. In no case has a motion for a new trial been heard, after a judgment has been regularly perfected. The case of *Shepherd* arose soon after the present rules and orders of the Court were made; and the Court, under the particular circumstances of the case, of an alleged misapprehension of the meaning of the 4th rule of *January* term, 1799, allowed the motion to be made.

Motion denied.

BENNET against D. SMITH AND PHELPS.

THIS was an action of *assumpsit* on twelve promissory notes, dated *June* 3, 1811, for twenty-five dollars each, made by the defendants, payable to *Caleb M. Fitch*, or bearer, on the first of *June*, 1812. Plea, *non assumpsit*. The cause was tried at the *Cortlandt* circuit, in *June*, 1817, before Mr. Justice *Platt*.

The defence at the trial was usury; to prove which, the defendants called *Abner Humphreys* as a witness, who testified, that in *May*, 1811, *Fitch* applied to him for a loan of a sum of money, which he declined lending, but said, that if *Fitch* had any good notes, he would purchase them. A few days afterwards, *Fitch* brought the witness several notes, executed by the defendants, amounting, in the whole, to 363 dollars, including the notes on which this suit was brought, which the witness purchased, at a discount of twenty-one per cent., or for 300 dollars. The witness said, that at the time of the purchase, he did not know but that the notes were given by the defendants to *Fitch* in the ordinary way of business; and that it was not

A note made for the accommodation of the payee, for the purpose of raising money on it, at an usurious rate of interest, and sold by him at a discount greater than the lawful rate of interest, is void. (a)

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(a) Vide *Perrell v. Waters*, 8 Cow. Rep. 669, ante, page 44.

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previously agreed that these, or any other notes of the defendants, should be procured for that purpose; that the witness merely agreed to purchase notes to about that amount, at a discount of twenty-one per cent.

The defendants then offered *D. Edwards* as a witness, to prove that *Fitch* applied to the defendants for a loan of their notes to him, for 363 dollars, and informed them that he had agreed with *H.* to sell the notes to him for 300 dollars; and that the notes were accordingly executed by the defendants for that purpose. This evidence was objected to on the ground, that as, between the original parties, there was no usurious contract, and that the facts offered to be proved were not sufficient to make the notes void for usury, unless it was shown, either that it had been previously agreed between *H.* and *F.* that the notes in question should be obtained for that purpose, or that *H.* knew at the time that the notes were not given to *F.* in the course of business, but were executed merely for his accommodation, for the purpose of selling them to *H.* at a discount.

The judge overruled the objection, and the witness testified, that *Fitch* applied to the defendants for their notes, and told them that he had agreed with *H.* for 300 dollars, at twenty-one per cent. discount; that there must be fourteen notes of twenty-five dollars each, and one note of thirteen dollars, making, together, 363 dollars; that the defendants agreed to make the notes for that purpose, and they accordingly executed them. The defendants offered to prove the confessions of *H.* in regard to the transaction, while the notes were in his hands. The evidence was objected to, but the judge decided that it was admissible. *Barna Smith*, the witness, testified, that, in 1812, he applied to *H.* for a loan of money, and *H.* said he could not lend the money, unless he could obtain payment from the defendants of money he had lent them, which the witness understood from *H.* to be 300 dollars, for which he had taken their notes for 365 dollars.

[* 357] The judge charged the jury, that if they believed the testimony of *Edwards*, and that the notes in question were made by the defendants to *Fitch*, to enable him to raise the *sum of 300 dollars from *H.* at an interest of twenty-one per cent., and that *F.* so obtained the money, the contract was usurious, and the notes void, under the statute; that it was immaterial whether *H.* knew the manner in which *F.* obtained the notes; he took them at his peril, and though he may have supposed them to have been given in the ordinary course of business, they were, nevertheless, void.

The plaintiff having been nonsuited, a motion was now made to set the nonsuit aside.

Collyer, for the plaintiff, contended, 1. that the evidence of *B. Smith* was improperly admitted, as it went to discredit *H.*
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phrey, the defendants' own witness; though they might prove facts *a'iunde*, that would discredit him. (*Phillips's Ev.* 213, 214. *Bull. N. P.* 297. 1 *Tuunt.* 377. *Peake's Ev.* 125, 126. *Swift's Ev.* 143, 144.)

2. The transaction was not usurious.

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VAN NESS, J. The case of *Munn v. The Commission Company* (*ante*, p. 44.) is decisively against you in this point. We decided that a note made for the purpose of being discounted at an usurious interest, and endorsed for the accommodation of the maker, was void in its original formation.

Sherwood, *contra*, was stopped by the Court.

Per Curiam. The motion to set aside the nonsuit must be denied.

Motion denied.

*THE PEOPLE OF THE STATE OF NEW-YORK, *ex relatione* [* 358]
THE ATTORNEY-GENERAL, *against* THE UTICA INSURANCE COMPANY.

THIS was an information in the nature of a *quo warranto*, filed by the attorney-general against the defendants, for exercising banking privileges, without authority from the legislature.

An information, in the nature of a *quo warranto*, lies against an incorporated company, for carrying on banking operations without authority from the legislature. (a) Privileges and immunities of a public nature, which cannot legally be exercised without a legislative grant, are franchises, although they never existed in the people, or could be exercised by them in their political capacity.

Since the act to restrain unincorporated banking associations, April 11th, 1804, (sess. 27. c. 117, re-enacted April 6th, 1813, sess. 36. c. 71. 2 *N. R. L.* 234.) the right or privilege of carrying on banking operations, by an association or company, is a franchise, which can only be exercised under a legislative grant. (b)

An information in the nature of a *quo warranto*, for usurping a franchise, need show no title in the people to the franchise, but it lies with the defendant to show his warrant for exercising it.

Where the words of a statute are obscure or doubtful, the intention of the legislature is to be resorted to, in order to discover their meaning.

A thing within the intention is as much within the statute as if it were within the letter: and a thing within the letter is not within the statute, if contrary to the intention of it.

Such construction ought to be given as will not suffer the statute to be eluded.

A statute, restraining any person from doing certain acts, applies equally to corporations, or bodies politic, although not mentioned.

A corporation has no other powers than such as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted.

The act to incorporate the *Utica Insurance Company*, passed March 29th, 1816, (sess. 39. c. 52.) does not authorize the company to institute a bank, issue bills, discount notes, and receive deposits, such powers not being expressly granted by the legislature, and not being within their intention, as collected from the act of incorporation; and the company having assumed and exercised those powers, they were held to have usurped a franchise, and on an information in the nature of a *quo warranto*, being filed by the attorney-general, judgment of ouster was rendered against them. (c)

(a) Vide *The People v. Trustees of Geneva College*, 5 *Wendell's Rep.* 211. *The People v. Richardson*, 4 *Cow. Rep.* 97.

(b) *Utica Ins. Co. v. Bloodgood*, 4 *Wendell's Rep.* 652. *Barker v. The Mechanic Ins. Co.* 3 *Ibid.* 94. *North River Ins. Co. v. Lawrence*, 3 *Wendell's Rep.* 482. *Utica Ins. Co. v. Hunt*, 1 *Ibid.* 56. *Utica Ins. Co. v. Kip*, 8 *Cow. Rep.* 20. *Utica Ins. Co. v. Scott*, 8 *Cow. Rep.* 709. *Ex parte Peru Iron Co.* 7 *Ibid.* 540. *The People v. Van Slyck*, 4 *Ibid.* 297. *The People v. Tibbits*, 4 *Cow. Rep.* 368. *Utica Ins. Co. v. Scott*, 19 *Johns. Rep.* 1.

(c) *N. Y. Firemen Ins. Co. v. Sturges*, 2 *Cowen*, 664. *Id. v. Ely*, 2 *Cowen*, 678.

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The defendants were incorporated by an act of the 29th of *March*, 1816, (sess. 39. c. 52.) (a) and as the questions arising and discussed in this case related principally to the true construction of the act of incorporation, it becomes necessary to set forth such parts of it as are material to the points raised on the argument, and decided by the Court. These are as follows:—

“Whereas it has been represented to this legislature, that incorporating an insurance company, which has been formed in the village of *Utica*, will tend to mitigate the awful calamities of fire, to give greater security to manufacturers, and more confidence to those who adventure their property on our vast navigable waters. And whereas it doth appear, that these objects are laudable, and that a company promoting them in the interior of our country, where the profits must necessarily be small, should be liberally encouraged: Therefore,

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“I. *Be it enacted by the people of the state of New-York, represented in senate and assembly,* That all such persons as now are associated, or hereafter shall associate together, for the purpose, shall be, and hereby are, constituted and declared to be, from time to time, and at all times hereafter, from the passing of this act until the first *Tuesday of July*, which will be in the year 1836, a body politic and corporate, in fact and in name, by the name of the ‘*Utica Insurance Company* ;’ and that by the same name, they and their successors, during the period aforesaid, shall and may have continual succession, and shall be capable in law of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, and in all manner of actions, suits, complaints, matters and causes whatsoever; and that they and their successors may have a common seal, and may change and alter the same at their pleasure; and by the same name be capable of purchasing, holding and conveying any estate, real and personal, for the use of the said corporation, in the convenient transaction of its business, and subject to the restrictions and conditions hereinafter contained.

“II. *And be it further enacted,* That this corporation shall have full power and authority to make contracts of insurance, with any person or persons, body corporate or politic, against losses or damages, by fire or otherwise, of any houses, or boats, ships, vessels, or buildings whatsoever, and of any goods, chattels, or personal estate whatsoever, and all kinds of insurance upon the inland transportation of goods, wares, or merchandise, for such term or terms of time, and for such premium or consideration, and under such modifications and restrictions, as may be agreed on between the said corporation and the person or persons agreeing with them; and, in general, of doing and performing, in these operations, all the business generally performed by insurance companies; excepting therefrom, that this corporation shall not engage in loaning any money upon bottomry and

(a) 3 R. S. 554

respondentia, nor in making any insurance upon any life or lives; any thing that may be in the practice or charter of any other insurance company to the contrary notwithstanding; *and excepting, further, the restrictions and prohibitions hereinafter contained.

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“ V. *And be it further enacted*, That if, on any anniversary day of election for directors, the stockholders owning two thirds of the whole amount of the stock subscribed to this corporation, shall vote to discontinue the business of the said corporation, it shall be the duty of the directors to cease forthwith from assuming any new risk of insurance, and from doing any new business, or operations of any kind whatever, excepting such as may tend to accelerate the closing of the concerns of the said corporation; and it shall further be the duty of the said directors, as soon as may be, to dispose of all the property of the said corporation, and to call in all parts of the funds or capital stock of the said corporation, which may have been loaned by the said corporation; and after the funds and property of the said corporation shall have been thus collected and received, to make an equal division of the same among the stockholders, in the proportion that they shall be equitably entitled to, by the number of shares of the stock of the said corporation which they may respectively own; and after all the property of the said corporation shall have been thus divided and paid over, the said corporation shall cease and be dissolved.

“ IX. *And be it further enacted*, That the directors for the time being shall have power to call and demand from the stockholders, respectively, at such time or times as they shall think proper, the remainder of all sums of money by the said stockholders subscribed, &c. *And further*, the said directors shall have power to make and pursue such by-laws, rules and regulations as they shall deem proper, touching the management of the stock, property, estate, effects and concerns of the said corporation, the election of directors, the transfer of stock, the employment of the clerks, officers, servants and agents of this corporation, and the investments of the funds of the corporation, which the business of insurance may not actively employ. *Provided, however*, that such investments, by-laws, rules and regulations, shall not be repugnant to the constitution and laws of this state, or of the *United States*, nor forbidden by this act in the restrictions and prohibitions on this corporation hereinafter contained.

“ XII. *And be it further enacted*, That the said corporation may receive, take and hold mortgages on any real estate, chattels, or tenements, if the same shall be *bona fide* mortgaged or pledged to the said corporation, or to secure the payment of any debt which may become due to the said corporation, by any means howsoever. And the said corporation shall have power to proceed on the said mortgages, or on any other security, for the recovery of the money thereby secured to them, either at law or

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in equity, as any other body corporate, or any individual, might, is, or shall be authorized to proceed, were he or it the one to whom the securities had been given. And it shall be lawful for the said corporation to purchase on sales made by virtue either of a judgment at law, or decree or order of a Court of equity or otherwise, and to take any real estate, in payment, or toward satisfaction of any debt, or sum of money due to the said corporation, and to hold such real estate, so to be purchased or received, or taken as last aforesaid, until they can conveniently sell, and convert the same into money or other personal property.

"XV. *And be it further enacted*, That at every regular meeting of the board of directors, a majority of the directors present shall be competent to decide on all business and concerns relating to this corporation; and on the occasional or accidental absence of the president, the board shall be permitted to appoint one or more presidents, *pro tempore*, to officiate in his absence, who shall, on such occasions, be competent to perform all the duties which the president may perform by virtue of any by-law of the corporation; and any policy or engagement, signed by the president, and attested by the secretary, when done conformably to any by-laws of the directors, shall be valid against, and effectually bind, the said corporation, without the presence of a board of directors, and as effectually as if under the seal of the said corporation. *Provided, however*,

"XVI. *And be it further enacted*, That no policies or engagements whatsoever, which shall, as aforesaid, be entered into by this corporation, with any individual, body corporate or politic, either without the seal of this corporation or otherwise, shall be transferable, negotiable, or assignable, *so as to give such second holder or assignee a claim on the said corporation, either in his own name or the name of the person originally concerned, unless the consent of this corporation shall have been previously obtained, and endorsed in writing on such instrument, or unless such a privilege form a part of the original agreement, and be expressly granted by this corporation.

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"XVIII. *And be it further enacted*, That no part of the funds or capital of this corporation, which the business of insurance may not actively employ, nor any other part or portion of the funds or capital of this corporation, shall at any time be, by the said corporation, either directly or indirectly, employed, to deal or trade in buying or selling any goods, wares, or merchandise; or in the purchase or sale of any grain or other produce, foreign or domestic; or in buying or selling any funded or other stock created by any act of the Congress of the *United States*, or of any particular state; or in buying or selling the stock of any bank; or in loaning any money, and issuing any notes, as herein before prohibited. *Provided, however*,

"XIX. *And be it further enacted*, That the said corporation shall be permitted to receive any such stock or funds, to make up or secure any part of the capital subscribed to this corpora-

tion, or to secure the payment of any debt due to the corporation. And the said stock or funds, after so received, to sell, when the occasions of the company shall require it."

The record in this case was entitled of *August* term, 1817, and after the *placita* proceeded in the following form:—

Albany, ss. Be it remembered, that heretofore, to wit, in the term of *May* last past, at the city hall of the city of *New-York*, came before the justices of the Supreme Court of Judicature aforesaid, *Martin Van Buren*, attorney-general of the people of the state of *New-York*, and for the said people gave their said Court, before the justices thereof, then and there to understand and be informed, in manner following, that is to say: *Martin Van Buren*, attorney-general of the people of the state of *New-York*, who sues for the said people in this behalf, comes here before the justices of the people of the state of *New-York*, of the Supreme Court of Judicature of the same people, on the 16th day of *May*, in the said term, at the city hall of the city of *New-York*, and for the said people gives the Court here to understand and be informed, that the *Utica Insurance Company*, for the space of six months now last past, and more, have used, and still do use, without any warrant, charter, or grant, the following liberties, privileges and franchises, to wit, that of becoming proprietors of a bank or fund for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may and do transact by virtue of their respective acts of incorporation, and also that of actually issuing notes, receiving deposits, making discounts, and carrying on banking operations and other moneyed transactions which are usually performed by incorporated banks, and which they alone have a right to do, of all which liberties, privileges, and franchises, aforesaid, the said *Utica Insurance Company*, during all the time aforesaid, have usurped, and still do usurp upon the said people, to their great damage and prejudice; whereupon the said attorney of the said people prays advice of the said Court in the premises, and due process of law against the said *Utica Insurance Company*, in this behalf to be made to answer to the said people by what warrant they claim to have, use and enjoy the liberties, privileges and franchises aforesaid.

And now at this day, that is to say, on the fourth day of *August*, in this same term, to which day the said *Utica Insurance Company* had leave to answer the said information, come the said *Utica Insurance Company*, by *Nathan Williams*, their attorney, and having heard the said information, complain that they are, by color thereof, grievously used and disquieted, and this unjustly, because protesting that the said information, and the matters therein contained, are not sufficient in law. to which information the said *Utica Insurance Company* are not bound by the law of the land to answer, yet for plea in this behalf, the said *Utica Insurance Company* say, that by a certain act of the legislature of the people of this state, passed on the twenty-ninth

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day of *March*, in the year of our Lord 1816, they, the said *Utica Insurance Company*, were constituted and declared to be, *from the passing of the said act, until the first *Tuesday of July*, in the year of our Lord 1836, a body politic and corporate, in fact and in name, and by the name of the *Utica Insurance Company*. And the *Utica Insurance Company* further say, that by the force of the said act of the said legislature, and the provisions thereof, they still continue to be, and are, a body politic and corporate, in fact and in name, and are entitled to do all lawful acts, and to enjoy all the rights, privileges, franchises and immunities allowed to them, or conferred on them by the said act, or by the law of the land, by virtue whereof the said *Utica Insurance Company*, for all the time in the said information in that behalf mentioned, have used, and still do use, the liberties, privileges and franchises of becoming proprietors of a bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business, which incorporated banks may do and transact by virtue of their acts of incorporation, by investing in the said bank and business the funds of the said *Utica Insurance Company*, which the business of insurance in the said act mentioned did not actively employ; and the said *Utica Insurance Company* have, during all the said time, used, and still do use, the liberties, privileges and franchises of actually issuing notes, other than notes which grant or stipulate to pay annuities upon any life or lives, and of actually issuing notes, receiving deposits, making discounts, and carrying on banking operations, and other moneyed transactions, which are usually performed by incorporated banks. And the said *Utica Insurance Company* have claimed, and yet do claim, to have, use, and enjoy, all the liberties, privileges and franchises to them belonging, by virtue of the aforesaid act of the said legislature, as it was, and is, lawful for them to do; without this, that the said *Utica Insurance Company* have carried on any other moneyed transactions which incorporated banks alone have a right to do; and also without this, that they have invested any of their funds which the business of insurance mentioned in the said act might actively employ, in the said bank or fund for the purposes aforesaid, or any of them, or for any other purposes repugnant to the constitution and laws of this state, or of the *United States*, or forbidden *by the said act; and also without this, that the said *Utica Insurance Company* have issued or claimed to issue any notes which grant or stipulate to pay any annuity or annuities upon any life or lives; and without this, that the said *Utica Insurance Company* have usurped the said liberties, privileges and franchises upon the said people of this state, in manner and form as by the said information is above supposed; all which said several matters and things, they, the said *Utica Insurance Company*, are ready to verify, as the Court shall award: whereupon they pray judgment, and that the aforesaid liberties, privileges, and franchises, in form aforesaid, claimed by them,

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He said *Utica Insurance Company*, may for the future be allowed to them, and that they may be dismissed and discharged by the Court hereof, and from the premises aforesaid.

And the said *Martin Van Buren*, attorney-general of the people of the state of *New-York*, who sues for the said people in this behalf, comes and says, that the said plea and answer of the said *Utica Insurance Company*, by them above pleaded, and the matters therein contained, in manner and form, as the same are above pleaded and set forth, are not sufficient in law to bar the said people from having and maintaining their aforesaid action thereof, against them, the said *Utica Insurance Company*, and that he, the said *Martin Van Buren*, attorney-general as aforesaid, is not bound by the law of the land to answer the same, which he is ready to verify; wherefore, for want of a sufficient plea and answer in this behalf, he prays judgment, and that the said *Utica Insurance Company*, with the liberties, privileges and franchises, may in no way intermeddle, but may be altogether excluded from the same.

And the said *Utica Insurance Company* say, that their said plea and answer, by them above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said attorney-general from having and maintaining his aforesaid action thereof against them, the said *Utica Insurance Company*, and that they, the said *Utica Insurance Company*, are ready to verify and prove the same, when, where, and in such manner as the Court here shall direct and award; wherefore, inasmuch as the said attorney-general has not answered the said plea and answer, nor hitherto in any manner denied the same, the said *Utica Insurance Company* pray judgment, and that the aforesaid liberties, privileges and franchises, in form aforesaid, claimed by them, the said *Utica Insurance Company*, may, for the future, be allowed to them, and that they may be dismissed and discharged by the Court hereof, and from the premises aforesaid.

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Van Buren, (Att. Gen.) in support of the demurrer, contended, 1. That the act of the legislature, passed the 29th of *March*, 1816, by which the defendants were incorporated, was not intended by the legislature to confer on the defendants the right of banking, nor did it give that right. As to the rules to be observed in the construction of statutes, it was only necessary to refer to a few authorities. (*Bac. Abr. Statute* (l. 5.) The intention of the makers of the statute is to be regarded. A thing within the intention of the makers, is as much within the statute as if it were within the letter. If any doubt arises on the words of the enacting part of a statute, the preamble may be resorted to for an explanation. (*Crespigny v. Wittenoom*, 4 *Term Rep.* 790. 793. *Ryall v. Rolle*, 1 *Atk.* 174.) Now, the preamble to this act clearly points out the objects of the incorporation, and the purposes for which the act was passed. It is not

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possible to suppose, from the preamble, that it was intended to confer banking powers.

It will be said, perhaps, that, as the act contains no special prohibition of banking, it is to be inferred that the legislature intended to permit it. But there are numerous acts of incorporation passed both before and since the restraining act of the 11th of *April*, 1804, a note of which will be handed to the Court, which contain no prohibition of the kind; and yet it was never imagined that any of those corporations possessed banking powers.

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2. That the act of the legislature, entitled "An act to restrain unincorporated banking associations," passed the 11th of *April*, 1804, and revised in 1813, was intended to prevent and restrain all companies and associations, whether *incorporated or not, from banking, unless expressly authorized so to do by the legislature; and does so restrain them. (sess. 27. ch. 117. 3 *Webst. ed. Laws*, 615. 2 *N. R. L.* 234. sess. 36. ch. 71. s. 2.) (a) This statute ought to have a liberal construction; it is remedial, and it should be so constructed as to have its intended effect. A statute, though penal, if made to remedy an existing evil, will be liberally expounded. (*Hammond v. Webb*, 12 *Mod.* 232. *Attorney-General v. Sudell*, *Prec. in Ch.* 216. 6 *Bac. Abr.* 391. Statute, (I. 9.) During the same session in which the restraining act was passed, the legislature, *April* 10, 1804, (sess. 27. ch. 110. 3 *Webst. Laws*, 611.) declared, that nothing in the said bill (then just passed both houses) should be deemed or construed to prevent any person, association, or company, from transacting or pursuing any business other than such as companies or banks, incorporated for the express purpose of banking, usually do or transact. This legislative declaration was made on the memorial of the chamber of commerce of the city of *New-York*, expressing their apprehension, that the act might be so construed, as to subject individuals to inconvenient restrictions in their usual commercial business and pursuits.

3. That the defendants, when exercising the privilege of banking, although they act in their corporate name, do not act within their corporate powers, and must, therefore, be regarded, as respects their banking business, as an association of individuals unincorporated, and, therefore, within the words of the restraining act.

4. That the defendants, being a body corporate, have no rights except such as are specially granted to them, or as are necessary to carry into effect such as are so granted: the right of banking not being granted, either expressly or by implication, they could not have exercised it, even if no restraining act had ever been passed. A body corporate can act only in the mode prescribed by the law creating it. It must act up to the end and design of its founder. (*Beatty v. Mar. In. Co.* 2 *Johns.*

(a) 1 *R. S.* 712.

Rep. 109. 114. *Jackson v. Hartwell*, 8 *Johns. Rep.* 424. 1 *Bl. Com.* 422. 424.)

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**Harison and T. A. Emmet*, contra. 1. The acts charged against the defendants are not the exercise of *franchises*; and, therefore, an information in the nature of a writ of *quo warranto* will not lie against them. Franchise or not, is a question of law, and is not admitted by the demurrer. A franchise is a royal privilege, or branch of the royal prerogative, subsisting in the hands of the subject, by grant from the crown. A writ of *quo warranto* is the king's writ of right, and issues where a franchise is usurped, or forfeited by misuser. (2 *Bl. Com.* 37. *Finch's Law*, 38. 164. 166. 3 *Cruise's Dig.* 278. tit. 27. sect. 1.) The word "franchises" is often used, in common parlance, in a very broad sense, for all liberties; but its legal or technical signification is more confined. A franchise was, always, in *England*, a gem in the royal diadem. It was inherent in the crown from the first institution of monarchy. But the right of banking was never a franchise, or branch of the royal prerogative. The bank of *England* was established in 1694, pursuant to an act of parliament, (5 *W. & M.* cap. 20.) which authorized their majesties, *William and Mary*, to grant a commission to take subscriptions from individuals, and to incorporate them. Had the power of banking been a royal franchise, this special authority from parliament would not have been necessary.

In 1697, (8 & 9 *W. & M.* ch. 20. s. 28.) it was enacted that, during the continuance of the bank of *England*, no other bank, or any other corporation, society, fellowship, company, or constitution, in the nature of a bank, should be erected or established, &c., by act of parliament. This still left individuals and ancient corporations free to bank. But in 1708, (7 *Anne*, ch. 7. s. 61.) it was enacted, that during the continuance of the bank of *England*, it should not be lawful for any corporation, erected, or to be erected, (other than the said bank,) or for any other persons in partnership, exceeding the number of six persons, to take up money on their bills or notes, &c. It is clear, then, that if parliament had not interfered, all corporations might lawfully have carried on banking business; the act of 7 *Anne*, restraining them, does not declare it unlawful, but merely prohibits the exercise of the power while the bank of *England* continued. It is manifest, therefore, that, in *England*, banking was not considered *as a royal franchise; and private banking is now carried on in that country, by associations of partnership of not more than six persons.

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If we look to the acts of our legislature, we shall find that they speak the same doctrine. Numerous acts of incorporation have been passed since the restraining act of April 11, 1804, each of which contains a special clause to restrain the corporation from banking. [Here the counsel enumerated more than fifty acts passed since 1804, which, he said, contained a special

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restraining clause.] It is remarkable, also, that, in the same session in which the restraining act was passed, there was an act of incorporation passed, containing a special prohibition against banking. What stronger evidence can be wanted of the sense of the legislature, that the right of banking is not a franchise, but exists at large in every citizen, and may be freely exercised, unless expressly restrained by the legislature?

The right was open to every individual, and the defendants, being created a corporation, have, as its inseparable incidents, a perpetual succession, a capacity to sue and be sued, a right to purchase and hold land, to have a common seal, and to make by-laws, &c., (*Kyd on Corp.* 69, 70.) They might, therefore, as well as any individual, carry on banking business, unless expressly prohibited. If, then, this is not a royal franchise, no information in the nature of a writ of *quo warranto* lies; for these informations have been substituted in the place of that ancient *prerogative* writ. (2 *Co. Inst.* 496. 1 *Bulst.* 55, 56. *Rex v. Marsden*, 3 *Burr.* 1817. per *Wilmut*, J.) Not a case can be found in which a writ of *quo warranto* has been brought, or an information in the nature of one filed, for exercising the right of banking. In *The King v. Shepherd*, (4 *Term Rep.* 381.) Lord *Kenyon* said, that the old writ of *quo warranto* lay only where there was a usurpation on the rights and prerogatives of the crown; and that an information in the nature of a *quo warranto* could be only granted in such cases. So, in *The King v. The Corporation of Bedford Level*, (6 *East*, 359.) *Lawrence*, J., says, it has been always understood, that a *quo warranto* only lay for encroachments on franchises created by the crown.

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*Again; for the exercise of any power incidental to a corporation or association, a writ of *quo warranto* does not lie. As well might it lie to ascertain by what authority individuals assembled for political purposes. A person entitled to a manor, need not show by what title he holds a court-baron, for that is *incident* to a manor. (*Rex v. Stunton*, *Cro. Jac.* 259, 260.)

But it is said that the restraining act has made banking a franchise; and that no person can now exercise the right, without showing a legislative grant. Suppose, in *England*, after the restraining act, more than six persons had associated as bankers, would an information, in nature of a *quo warranto*, have been filed against them? No; their acts would have been illegal and void. How have the legislature assumed this prerogative and franchise? How have they taken to themselves what was before the common right of every citizen? By prohibiting all unincorporated banking associations. Is every thing which is made the subject of exclusive right or grant a franchise, and to be tried by a *quo warranto*? Ferries, running of *stages*, and *steam-boats*, are made exclusive rights; yet it has never been supposed that an information in nature of a *quo warranto* would lie in case of any invasion of these rights.

Again; the restraining act is not in the conjunctive: it de
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clares that "no person unauthorized by law shall subscribe to, or become a member of, any association, institution or company, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may, or do, transact, by virtue of their respective acts of incorporation." By this act the legislature *assume* the rights specified; they do not resume a franchise. If the legislature can thus assume all rights common to the citizens, there is no commercial business whatever which they may not prohibit; and so the chamber of commerce apprehended. And on their petition, the sections to the act, 27 sess. ch. 110. s. 8 and 9. were passed in explanation of the restraining act. It was, in effect, an act to restrain commercial partnerships or companies; but the explanatory sections do virtually repeal the restraining act.

*It may be said that banking is *quasi* a franchise or branch of prerogative. But when every individual has a right to bank, how can it be, in any degree or shape, a franchise? The act merely restrains associations. Every citizen, or inhabitant, may, if he pleases, be a banker. Can it be possible, that the legislature may assume to itself the rights of every citizen? Such is not the law of *England*. If it is the law of any country, it is that of *Turkey*, where, alone, it can be imagined that the common rights of man should be doled out for the purposes of gain. The mind revolts at the idea of a legislature bargaining out the common rights of the citizen for money. If the exercise of the right be injurious, prohibit it. What is granted should be given freely. A contrary doctrine would be attended with the most pernicious effects.

2. Even if the power of banking be a franchise, we contend that the act of incorporating the defendants confers on them authority to exercise that franchise. The meaning of the legislature must be eviscerated from the act itself. We must not regard the declaration of individual members, or information out of doors. The frame and scope of the act must be examined: we must read the title, the preamble, its sections and provisions, compare and weigh them all together. We must suppose that the legislature meant to grant what is expressly granted, and to prohibit only what they have expressly prohibited; and that every thing not prohibited is left free. It is said that no banking power is expressly given: we answer, that the exercise of such a power is not prohibited. Nay, we contend that it is clearly granted by the act. If we look at the *preamble*, after pointing out the objects of the incorporation, it says, they ought to be *liberally* encouraged. What is the *liberal encouragement* intended, unless it be the power to invest their surplus capital in any business not expressly prohibited? There are peculiar features in the act which show that the legislature intended to specify all the restrictions they thought proper to

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impose on the defendants. [The counsel here enumerated the restrictions and prohibitions contained in the several sections of the act.] After those specific restraints, the defendants *are left to employ their surplus capital in any manner which they may deem beneficial. It is not pretended that the defendants have abused their corporate powers, or have diverted funds, which ought to be employed in insurances, to other objects. When the legislature specified, with so much caution and precision, what the defendants should not do, why did they not go one step farther, and say, that the defendants should not use their capital in any banking operations whatever? From their silence and forbearance on this point, is it not to be fairly inferred, that they intended to leave the defendants free to bank, if they thought fit; especially when we see in another act of incorporation, passed the same session, an express prohibition of banking is inserted? It is true, we must so construe a statute as to find out the intention of the legislature. But how is that intention to be discovered? Not by asking the individual members of the legislature what they intended, but by reading the words of the act, and comparing all its parts together.

3. There is nothing in the act of incorporation, nor in any other act or law, that restrains the defendants from carrying on banking business. There is clearly nothing in the constitution or laws of the state that prohibits banking, unless it be found in the act passed the 11th of April, 1804, called the restraining act. Individuals had devised a mode of associating and issuing notes, without incurring an individual responsibility; and that act was passed to restrain *unincorporated* banking associations. The defendants, being a regular *corporation*, are not, then, within the title of the restraining act. In *Bristol v. Barker*, (14 Johns. Rep. 205.) this Court decided, that the restraining act applied only to associations or companies formed for banking purposes, not to an individual who carried on banking operations on his own credit and account.

Again; the restraining act inflicts penalties on persons who become members of such associations; clearly showing that the legislature meant only to prohibit on principles of public policy, and to inflict a punishment; but how can the members of a regular corporation, like that of the defendants, *be subjected to such penalties? If this general restraining act was to have this extended application, why did the legislature, in almost every subsequent act of incorporation, insert special clauses to prohibit banking? If more was intended, why not declare at once, that no person should make or discount a promissory note without a grant from the legislature, or a license from the governor? Every bank and moneyed institution in the state discounts notes. But the real *mischief* contemplated by the restraining act, was those associations formed for the purpose of issuing and discounting notes, without any individual responsibility.

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bility. No *corporations* were intended to be restrained; but merely unincorporated associations. The restraining act, then, does not apply to the *Utica Insurance Company*.

But it is said, that being incorporated for a specific purpose, the defendants can do nothing but the things specified, or such as are indispensably necessary for those objects; and that they derive all their power from the act or charter of incorporation, as the mere creatures of the legislature. But every corporation has a right to do every act incident to a corporate body, which is not expressly prohibited. So far as concerns the disposition of its property, a corporation has every right and capacity of an individual person, except so far as it may be expressly limited or restrained. If the act had said that the defendants should be a body corporate, &c., by the name of, &c., without any thing further, the powers and capacities for which we contend follow, as inseparable incidents. (*Kyd*, 69.) A *special* act of incorporation is not so much a grant of power as a restraint. Every specification of the rights and powers of the corporation is so far a restraint on the general powers it possesses by virtue of its corporate capacity. *Child v. The Hudson's Bay Company*, (2 P. Wms. 207. 209.) though a decision against the defendants, contains the principle for which we contend. Lord Ch. *Macclesfield* says, "A corporation has an implied power to make by-laws; but where the charter gives the company a power to make by-laws, they can only make them in such cases as they are enabled to do by the charter; for such power, given by the charter, implies a negative that they cannot make any other by-laws; *a fortiori*, they cannot make *by-laws in relation to projects and insurances, which, by act of parliament, are declared to be illegal." It follows, from this reasoning, that if they had no power to make by-laws expressly given, they might have made by-laws in regard to insurances, or any other object not illegal. A corporation, then, except as to the necessity of using its common seal, may do every thing, in regard to its property, which an individual could do; it may buy, sell, loan, pledge, &c. If not, what is the use or meaning of the various prohibitions, inserted in the act by which the defendants are incorporated? They are incorporated not merely for the purpose of insurance, but for other objects. They may *lend* money; and may make such by-laws, rules, and regulations, as they shall deem proper, touching the management of the stock, property, &c., and the investment of the funds of the corporation, which the business of insurance may not actively employ. (s. 5. & 9.) In various other acts of incorporation, the power of making by-laws, &c., is expressly limited to the single object of the charter. (*Act*, sess. 25. ch. 40. s. 7. *Marine Ins. Co.*; ch. 67. *Washington Mutual Ins. Co.* sect. 7.; sess. 28. ch. 72. *Commercial Ins. Co.*) They are incorporated, not for the sole object of making insurances, but for all other purposes, not unlawful, or expressly prohibited.

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They cannot loan money on bottomry or *respondentia*, nor make insurance on lives, nor grant annuities. (s. 2.) They can employ no part of their funds, not actively used in insurance, in trade, or in buying or selling goods, wares, or merchandises, or in the purchase or sale of grain or other produce, &c., or in buying or selling stocks, or in loaning money on mortgage. (sect. 18.) Yet they may loan money, and must have some security for it; and this must be by lending it on bills and notes, or discounting bills, &c. In what other way can they *invest* or employ their surplus capital? Again; the 16th section enacts, that no policies or *engagements* whatever, &c., shall be transferable, negotiable or assignable, so as, &c., unless the consent of the corporation shall have been previously obtained and endorsed in writing on such instrument, or unless such a privilege form a part of the original agreement, &c. And in the preceding section it is declared, that any policy or *engagement* *signed by the president, and attested by the secretary, when done conformably to the by-laws, &c., shall be valid against, and effectually bind the corporation, without the presence of the board of directors, and as effectually as if under the seal of the corporation. Are not the defendants, then, empowered to make *promissory notes* signed by their president, and attested by their secretary, which shall be valid and binding? If so, the defendants have done nothing unlawful. And if they had, this information is not the proper mode of calling them to an account.

Van Buren, in reply. 1. When a party objects to the jurisdiction of a Court, he must point out some other jurisdiction in which the cause may be tried. When this case was before the Court of Chancery, on an application for an injunction, (2 *Johns. Ch. Rep.* 371.) the counsel for the defendants objected to the jurisdiction of that Court, on the ground, that there was an adequate remedy at law, to wit, by an information in the nature of a *quo warranto*, in this Court. It is matter of surprise, therefore, that the same counsel should now object, in this place, that an information in the nature of a *quo warranto* is not the proper remedy, without condescending to point out any other possible remedy whatever. The general demurrer admits, that the power exercised by the defendants is a *franchise*; and it follows, that this is the proper remedy. But is it not a franchise? The chancellor had no doubt on the question. He says, that "the right of banking was, formerly, a common law right belonging to individuals, and to be exercised at their pleasure. But the legislature thought proper, by the restraining act of 1804, which has since been re-enacted, to take away that right from all persons not specially authorized by law. Banking has now become a franchise derived from the grant of the legislature, and subsisting in those only who can produce

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the grant ; if exercised by other persons, it is the usurpation of a privilege for which a competent remedy can be had by the public prosecutor in the Supreme Court." This ought, perhaps, to be a sufficient authority on this question. But to pursue it further: A franchise is a liberty or privilege. There is *a distinction between *royal* and *common* franchises ; between those of the sovereign, and those of the people, as the right of trial by jury. When the colony became a sovereign and independent state, the people succeeded to all the rights and privileges of *English* subjects, and more; they succeeded to all the rights and privileges of the crown or sovereign. The legislature have, accordingly, from time to time, granted various exclusive liberties and privileges, or franchises, to citizens. By the restraining act of the 11th of *April*, 1804, the legislature did take to itself the right or liberty of banking. What was before common to all, ceased to be so, and became a franchise or privilege in the government, not to be exercised by citizens, unless by grant. Whether this was a franchise in *England* or not, it is made a franchise here ; and the legislature were competent to make it so. It is true, that private individuals may bank ; but the defendants are an *association* carrying on banking business, in violation of the act of the 11th of *April*, 1804, passed expressly to prevent any unauthorized or unincorporated association from banking. Being a privilege, then, which the defendants could not lawfully exercise without a grant from the legislature, it comes within the very definition which has been given of a franchise. We could not proceed by indictment, for the act gives a penalty, and not to the people, but to the informer. If this remedy does not lie, there is no remedy, civil or criminal. It is, at least, a liberty, in the nature of a franchise ; and this is the only and proper remedy.

2. What are the actual rights of these defendants? What privileges did the legislature intend to confer on them? The intention of the legislature is the great object of inquiry. It is impossible to define all the considerations which the Court may take into view, to find out that intention ; the *title*, *preamble*, and *provisions* of the act itself ; the *mischief* existing ; the *remedy* applied ; the temper and circumstances of the times.

Mentioning that the objects of the defendants were deserving of *liberal encouragement* is, by no means, sufficient to afford the inference that the legislature intended to confer banking powers. If that privilege was intended to be given, *why not say so in express terms? Why should it be left to be made out by implication and inference? Great privileges are, in fact, conferred on the defendants, to enable them to carry into effect the objects of their incorporation, or insurances. The form of the act, compared with that of all the acts in which banking powers are conferred, is sufficient to satisfy any reasonable mind, that the legislature never intended to give these defendants power to bank. In all those acts in which the power is

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given, it is done in clear and express terms, reciting the petition for the privilege of banking, and granting it, *eo nomine*. But it is said, that the real intention of the legislature is of no importance if the specific powers which they have given amount to a privilege to bank. The words, "any policies or engagements," in the 15th section, are relied upon; but they do not imply a power to issue and discount notes. The 16th section declares, that no policy or engagement shall be transferable, negotiable, or assignable, without the consent of the corporation, &c. But this is not the language in which the legislature uniformly express themselves when they intend to confer a power to bank, or to issue bank bills or notes. When they mean to speak of banks, they use the words "issuing notes, receiving deposits, making discounts," &c., which constitute the proper business of banking. The 9th section authorizes the defendants to invest the funds of the corporation, not actively employed in the business of insurance. This does not give the power to discount bills or notes. They may invest their surplus funds in stocks, but they cannot buy and sell stocks; they cannot trade nor traffic. So, they may take mortgages or pledges for the security of any debts due the corporation.

This act could never have passed the *council of revision* if it had been capable of a construction that would give to the defendants the power of banking.

Again; we say the defendants are clearly within the restraining act. It is true, the word *corporation* is not used in that act. It speaks only of any *person* or *persons*. But it is manifest, especially when it is recollected what was the situation of things at the time, and what was the *mischief* intended to be prevented, that it was meant to restrain all associations, except the regularly-incorporated banks, from issuing bank notes. It could not have been the design of the legislature to leave every petty corporation in the state free to issue bank paper, at its pleasure. They meant to regulate and restrain banking, and to take into their own hands what was before common and at large. The explanatory act, passed on the petition of the chamber of commerce, shows the intention of the restraining act. No *person*, *association*, or *company*, are prevented from transacting or pursuing any business, other than such as companies or banks expressly incorporated for the purpose of banking, actually do, or transact.

Again; when the defendants undertook to carry on banking business, they did not act as a corporation, for they had no corporate capacity for that purpose. They are a corporation only while they act within their corporate powers. Would any *turnpike* or *manufacturing* corporation be allowed to set up a *steam-boat*, under the pretence that they were not a *person* or *persons* within the words of the act made to protect the proprietors of steam-boats? A corporation is a *political person* invested with various capacities. (*Kyd on Corp.* 13. 15. 70.)

THOMPSON, Ch J., delivered the opinion of the Court. The information filed, in this case, charges the defendants with engaging in banking operations, without any authority under the act incorporating them, and in violation of the prohibition in the act to restrain unincorporated banking associations. Upon the argument, two questions were raised and discussed; one, involving the general inquiry into the right of the defendants to carry on banking business; and the other, touching the remedy that has been pursued, if no such right exists. I think it unnecessary to enter at large into an examination of the latter question. Upon this point there is no difference of opinion on the bench, and I shall content myself with leaving it to Mr. Justice *Spencer*, while delivering his opinion on this branch of the case. I must be permitted, however, barely to remark, that this is rather an ungracious objection made here, considering the discussion that this case has undergone in the Court of Chancery, *where it was dismissed for want of jurisdiction in that Court to restrain the defendants, because there was a complete and adequate remedy at law, by an information in the nature of a *quo warranto*, and that, too, conceded by the defendants' counsel, as appears from the opinion pronounced in the Court of Chancery. (2 *Johns. Ch. Rep.* 376.) I do not mean, however, to conclude the party by that admission. The objection is properly and rightfully made here, and if well founded, we are bound to yield to it. But that it is not well founded is, I think, very clear; and the chancellor considered it a question not admitting of any doubt.

With respect to the other branch of the case, as there is some difference of opinion on the bench, it becomes proper and necessary, that I should examine it a little more at large. It may safely be admitted, that formerly the right of banking was a common law right belonging to individuals, and to be exercised at their pleasure. It cannot, however, admit of a doubt, that the legislature had authority to regulate, modify, or restrain this right. This they have done by the restraining act of 1804, (sess. 27. ch. 117.) and which has since been re-enacted and continued in full force. (2 *N. R. L.* 234.) (a) The construction which has been given by this Court to the act is, that it extends only to associations or companies formed for banking purposes, and not to an individual who carries on banking operations alone, and on his own credit and account. (14 *Johns. Rep.* 205.) The right of banking, therefore, by any company or association, has, since the restraining act, become a *franchise*, or privilege, derived from the grant of the legislature, and subsisting only in such companies or associations as can show such grant. The defendants have, accordingly, set up, as their authority, or charter, for the exercise of this privilege, an act passed 29th of *April*, 1816, entitled "an act to incorporate the

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Uti a Insurance Company." The real inquiry is, whet act contains any such grant of banking privileges.

It must certainly strike every person, on reading this little extraordinary, that if banking privileges were intended to be granted, that the usual phraseology of such charters was not adopted. It certainly could not have *arisen from the legislature being unaccustomed to make such grants. The numerous charters contained in our statute book precludes any such explanation. We do not find the word *bank*, or any expression that would naturally suggest to the mind any such object, used throughout the whole act. None of the usual, and what may be considered the appropriate and technical, language of such charters is adopted. If any such power is contained in this act, it is certainly not embraced in the general scope and avowed object of the grant, but must be collected from separate and detached parts of the act; and it requires the hand of a skilful workman so to put them together as to frame any thing like the plausible appearance of a banking statute. If this was one of the hidden objects in procuring the incorporation of an insurance company, it is not going too far to say, the legislature must have been deceived and imposed upon; otherwise no possible reason can be assigned why such privilege should be so concealed and obscurely granted. I do not, however, in construing the grant, mean to travel out of the act itself. But when a right is claimed under it, so manifestly repugnant to the general scope and object of the grant, we ought to keep this in view, when we are looking for the intention of the legislature. And if all parts of the act, and all the terms made use of, can be made to apply to the avowed objects of the incorporation, the sound rules of construction will so limit and apply them. That in construing a statute, the intention of the legislature is a fit and proper subject of inquiry, is too well settled to admit of dispute. That intention, however, is to be collected from the act itself, and other acts, *in pari materia*. It may not, however, be amiss to state, and keep in view, some of the established and well-settled rules on this subject.

Such construction ought to be put upon a statute as may best answer the intention which the makers had in view. And this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason and discretion, in the construction of the statute, although such *construction seem contrary to the letter of the statute. Where any words are obscure or doubtful, the intention of the legislature is to be resorted to, in order to find the meaning of the words. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers. And such construction

ought to be put upon it as does not suffer it to be eluded. (*Bac. Abr. Stat.* I. 5. 10, and authorities there cited.) The two latter rules are deserving of particular notice in the consideration of the case before us. When we are endeavoring to find out the intention of the legislature, in the act incorporating the *Utica Insurance Company*, we must keep in view the restraining act, which makes it unlawful for them to carry on banking business, unless authorized by their charter so to do. It was contended, however, upon the argument, that the restraining act has no application to this company. If that be so, I do not know but that their charter contains all the power necessary to carry on banking business. But I am unable to discover any possible grounds on which they can claim an exemption from the prohibitions contained in that act. It declares that no person, unauthorized by law, shall subscribe to, or become a member of, any association, institution, or company, or proprietor of any bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business, which incorporated banks may, or do transact, by virtue of their respective acts of incorporation. If the act incorporating the *Utica Insurance Company* gives them the right of banking, then, to be sure, they are not within the prohibition of the restraining act, for they are not unauthorized by law. But if their insurance charter does not give them banking powers, so far as they travel out of their grant, they act as a company of private persons, and become a mere association, doing business without any express authority by law. But although the restraining act does not, in terms, include incorporated companies, by expressly declaring that no corporation, unauthorized by law, shall become a member of, or connected with, any banking company, &c., yet the term *persons*, there used, will embrace incorporated companies in the prohibition. It was decided by this Court, in the case of *The Clinton Woollen and Cotton Manufacturing Company v. Morse and Bennet*, (October term, 1817,) that under the act for the assessment and collection of taxes, corporations are liable to be taxed for property owned by them; yet the act speaks only of persons liable to be assessed, and the term corporation is not used at all. So, also, in *England*, a corporation seised of land in fee, for their own profit, are considered inhabitants or occupiers, within the meaning of the statute 42 *Elizabeth*. ch. 2, and liable, in their corporate capacity, to be rated for the poor tax. (*Corp.* 73.) And Lord Coke, in his exposition of the statute 22 *Hen. VIII.* ch. 5, for the repair of bridges, commenting on the word inhabitants, with respect to what persons are included under that description, says, every corporation and body politic, having lands, &c., are inhabitants, within the purview of that statute. (2 *Inst.* 703.) If corporations can, under the term inhabitants, or persons, be subjected to the same burthens to which individuals are subject in the same character, they may, also, very properly, under the same term, be included

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within the prohibitions in the restraining act. And here one of the rules of construction I have alluded to applies with peculiar force; that such construction ought to be put upon a statute as does not suffer it to be eluded. Various prohibitory statutes might be referred to, where corporations must necessarily be included under the term *person*. I shall only refer to one. The act for the encouragement of steam-boats (sess. 31. ch. 225.) declares, that no *person* or *persons*, without the license of those who are entitled to the exclusive right, &c., shall set in motion, or navigate, upon the waters of this state, any boat moved by steam or fire. Would the construction be endured, that this prohibition extended only to individuals, and not to corporations? If so, the act is but a flimsy protection to those claiming the exclusive right. But there is no color for such a construction. Keeping in view, then, the restraining act, and applying the rules of construction I have mentioned, I am persuaded that we look in vain for banking powers in the act incorporating the *Utica Insurance Company*.

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*It becomes my duty, however, to notice, a little more particularly, the several parts of the act which have been relied upon as conferring such powers. The preamble is said to contain some such intimation, because it declares, that this company ought to be *liberally encouraged*. This is certainly a pretty forced extension of that expression, and not warranted by any thing contained in the recital, which states, that incorporating an *insurance company* which had been formed in *Utica*, would tend to mitigate the calamities of fire, give security to manufacturers, and confidence to those who adventure their property on our vast navigable waters; that those are laudable objects, and that a company promoting them ought to be liberally encouraged. But it is far fetched, indeed, to suppose that the right of carrying on banking operations was intended or intimated by this liberal encouragement. The second section, which professes to enumerate and define the powers of the company, does not contain an intimation that the right of banking is among such powers; and it cannot grow out of the general clause which authorizes them to transact all the business generally performed by *insurance companies*, excepting certain specified kinds of business therein particularly mentioned. It was, however, contended on the argument, that the right of carrying on banking operations was necessarily incident to the corporation, because not expressly prohibited, if they had surplus funds which they could spare for that purpose. But I cannot assent to this rule of construing a charter of incorporation for a *specific object*. Such an incorporated company have no rights except such as are specially granted, and those that are necessary to carry into effect the powers so granted. Many powers and capacities are tacitly annexed to a corporation duly created; but they are such only as are necessary to carry into effect the purposes for which it was established. The specification of certain powers operates as a
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restraint to such objects only, and is an implied prohibition of the exercise of other and distinct powers. A contrary doctrine would be productive of mischievous consequences, especially with us, where charter privileges have been so alarmingly multiplied.

But it is said, that the 9th section of the act contains *a direct grant of banking powers, not, indeed, *eo nomine*, but by necessary implication, because it gives to the directors power to make such by-laws, rules, and regulations, as they shall deem proper, touching the management of the stock, property, estate, effects, and concerns, of the corporation, &c., and the investment of the funds of the corporation, which the business of insurance may not actively employ. Admitting that here is a power granted to invest their surplus funds in banking operations, were it not for the restraining act, yet, when we see that such a use of their surplus funds would be directly in the face of that act, we ought not to give such a construction to these words, unless no other sense or meaning can be attached to them, and their funds would be obliged to lie dead and unemployed. Besides, the proviso to this clause, which seems to have been overlooked, may very fairly admit of a construction amounting almost to an express prohibition, to employ such funds in banking business. It declares, that such *investment* shall not be repugnant to the *laws* of this state, nor forbidden by that act in the restrictions and prohibitions on this corporation, thereafter mentioned. But an investment or employment of these surplus funds in banking business, if not authorized by law, would be against the restraining act, and so repugnant to a law of this state, and, therefore, coming directly within the prohibition contained within the proviso. But these surplus funds may be invested in many ways, besides in banking business, consistently with the provisions of this act, and not prohibited by any other law; and it is rather a forced use of the term *invest*, to apply it to an active capital employed in banking. It is usually applied to a more inactive and permanent disposition of funds. And although it might extend to banking, yet it ought not to receive that interpretation here, when another sense, more obvious, and consistent with the general object of the incorporation, may be given to it. One of the rules of construction alluded to may properly be applied here; that although a thing be within the letter of the statute, it is not within the statute, unless it be within the intention of the makers. The surplus funds may, no doubt, be loaned at interest. The second section of the act prohibits the loaning *for certain specified purposes; but the loaning for any other purpose, and in any other way not prohibited by law, is authorized and included in the general power to invest the surplus capital; and under the 12th section, they have a right to take and hold mortgages to secure such loans; for this section expressly declares, they shall have the right so to do, to secure the payment of any debt

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which may become due to the corporation, by any means howsoever. A bond or note given to the corporation, on a loan of money, creates a debt due to them, and the payment may be secured by mortgage, by the express authority here conferred. There is, then, we see, granted the right to *invest* the surplus funds in a manner much more consistent with the ordinary understanding of the term *investment*, than to employ them in banking business. It would, therefore, be against every just rule of construction, to give to this term the latter interpretation.

It is under the 15th and 16th sections, that the right to make promissory negotiable notes is claimed; and admitting such authority to be there given, it does not follow that banking powers are also granted. Any company or association may enter into an arrangement to transact their business in a particular manner, and agree to be bound by any *engagement*, made and signed by certain designated agents. This would be binding on the company. It is not, however, the mere power of making such notes, or the particular manner in which they are made, that will confer banking powers, under the restraining act. But it is a very strained construction of the term *engagement*, to suppose it means a *bank note*. This is not the usual and ordinary acceptance of the term. If any such thing had been intended by the legislature, the more appropriate term would, doubtless, have been employed. The word *engagement*, as used in the act, may very fairly be considered as synonymous with policy. Yet a more enlarged sense might be given it, and still limit it to contracts in and about the business of insurance, and the transactions expressly authorized by the charter. The 5th section has been supposed to contain, in some degree, words that help out the construction contended for by the defendants. By this section, the stockholders owning two thirds of the stock *may vote to discontinue the business of the corporation; and in such case, the directors are required to call in all parts of the funds, or capital stock of the corporation, which may have been loaned, and all debts of any nature which may be due to the corporation. But nothing more is implied, or to be inferred from this authority or direction, than that the corporation may make loans and have debts due to them. It does not follow that such loans were made, or such debts created, in the course of banking operations. They may have debts owing to them as premiums, and otherwise; and it has been shown that they may also loan money. It would be a gross violation of the rules of construction, which I have noticed, to consider this as necessarily implying the right of entering at large into the business of banking.

I have, I believe, noticed all those parts of the act on which any reliance has been placed, to make out the authority claimed under it by the defendants. And I think I have shown, that there is no power or privilege conferred by this act, which may

not be enjoyed, nor any one term or expression used, that may not be explained, and receive an appropriate meaning and application, without assuming that the right of carrying on banking operations is granted. I am, accordingly, of opinion that the defendants are unauthorized, by law, to enter in to such business, and that judgment of ouster ought to be rendered against them.

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SPENCER, J. Two questions have been brought forward in the argument :—

1st. Whether an information in the nature of *quo warranto* will lie in this case.

2. Whether the defendants have authority, under the act incorporating the *Utica Insurance Company*, to carry on banking operations in the manner set forth in their plea.

The statute (1 N. R. L. 108.) (a) gives this writ against any person who shall usurp, intrude into, or unlawfully hold and execute, any office, or franchise, within this state; and if the right set up by the defendants is a franchise, and the act under *which they claim to exercise it, does not confer it, then the defendants are subject to this prosecution.

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A franchise is a species of incorporeal hereditament : it is defined by *Finch* (164.) to be a royal privilege, or a branch of the king's prerogative subsisting in the hands of a subject; and he says, that franchises being derived from the crown, they must arise from the king's grant, or, in some cases, may be held by prescription, which presupposes a grant; that the kinds are various, and almost infinite, and they may be vested in natural persons, or in bodies politic.

All the elementary writers agree in adopting *Finch's* definition of a franchise, that it is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.

An information, in the nature of a writ of *quo warranto*, is a substitute for that ancient writ, which has fallen into disuse; and the information which has superseded the old writ, is defined to be a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, and seize it for the crown. It has, for a long time, been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only. (2 *Inst.* 281. pl. 12. 3 *Burr.* 1817. 4 *Term Rep.* 381. 1 *Bulst.* 55.)

If there are certain immunities and privileges in which the public have an interest, as contradistinguished from private rights, and which cannot be exercised without authority derived from the sovereign power, it would seem to me that such immunities and privileges must be franchises; and the act for rendering the proceedings upon writs of *mandamus*, and informations in the nature of *quo warranto*, more speedy and effectual, presup-

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poses that there are franchises, other than offices, which may be usurped and intruded into. If, in *England*, a privilege in the hands of a subject, which the king alone can grant, would be a franchise, with us, a privilege, or immunity of a public nature, which cannot legally be exercised without legislative grant, would be a franchise. The act commonly called the restraining law, (sess. 27. ch. 114.) (a) enacts, that no person, *unauthorized by law*, *shall subscribe to, or become a member of, any association, or proprietor of any bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks do, or may transact, by virtue of their respective acts of incorporation.

Taking it for granted, at present, for the purpose of considering whether the remedy adopted is appropriate, that the defendants have exercised the right of banking, without authority, and against the provisions of the restraining act, they have usurped a right which the legislature have enacted should only be enjoyed and exercised by authority derived from them. The right of banking, since the restraining act, is a privilege or immunity subsisting in the hands of citizens, by grant of the legislature. The exercise of the right of banking, then, with us, is the assertion of a grant from the legislature to exercise that privilege, and, consequently, it is the usurpation of a franchise, unless it can be shown that the privilege has been granted by the legislature. An information, in the nature of a writ of *quo warranto*, need not show a title in the people to have the particular franchise exercised, but calls on the intruder to show by what authority he claims it; and if the title set up be incomplete, the people are entitled to judgment. (2 *Kyd on Corp.* 399. 4 *Burr.* 2146, 7.)

This position is illustrated by the nature and form of the information; the title of the king is never set forth; but after stating the franchise usurped, the defendant is called upon to show his warrant for exercising it.

This consideration answers the argument urged by the defendant's counsel, that banking was not a royal franchise in *England*, and that it is not a franchise here which the people, in their political capacity, can enjoy; for if their title to enjoy it need not be set out in the information, it is not necessary that it should exist in them at all. In the case of *The King v. Nicholson and others*, (1 *Str.* 303.) it appeared that by a private act of parliament for enlarging and regulating the port of *Whitehaven*, several persons were appointed trustees, and a power was given to them to elect others upon vacancies by death or otherwise. The defendants took upon them to act as trustees without such an election; and *upon motion for an information in the nature of a *quo warranto* against them, it was objected, by the counsel for the defendants, that the Court never grants these informations but in cases where there is a usurpation upon some

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franchise of the crown; whereas, in that case, the king alone could not grant such powers as are exercised by the trustees, the consequence of which was, that this authority was no prior franchise of the crown. To this it was answered, and resolved by the Court, that the rule was laid down too general, for that informations had been constantly granted when any new jurisdiction or public trust was exercised without authority; and leave to file an information was, accordingly, granted. This case is a strong authority in favor of this proceeding.

Many cases might be cited, in which informations, in the nature of *quo warranto*, have been refused, where the right exercised was one of a private nature, to the injury only of some individual. In the present case, the right claimed by the defendants is in the nature of a public trust: they claim, as a corporation, the right of issuing notes, discounting notes, and receiving deposits. The notes they issue, if their claim be well founded, are not obligatory on the individuals who compose the direction, or are proprietors of the stock of the corporation. These notes pass currently, on the ground that the corporation have authority to issue them, and that they are obligatory on all their funds: the right claimed is one, therefore, of a public nature, and, as I conceive, deeply interesting to the community; and if the defendants cannot exercise these rights without a grant from the legislature; if they do exercise them as though they had a grant, they are, in my judgment, usurping an authority and privilege of a public kind; and we perceive, that it is not necessary that the right assumed should be a prior franchise of the crown, or of the people of the state.

Had the defendants claimed and exercised the right of banking as private individuals, I agree that an information would not lie against them; they would have been subject only to the penalties inflicted by the act; but they claim the privilege as a corporation, and under a grant from the legislature. If they have not that grant, they have exercised *and usurped a franchise, and the remedy pursued is well adapted to the case.

This brings me to the second question.

The *Utica Insurance Company* was incorporated on the 29th of March, 1816; and it is contended on the one hand, and strenuously denied on the other, that the act gives to the corporation the power of banking.

The preamble to the act has been resorted to, to show the object of the incorporation and the intention of the legislature, and both parties draw conclusions favorable to their positions from it. The true rule on this subject undoubtedly is, that the preamble of an act cannot control the clear and positive words of the enacting part, but may explain them, if ambiguous. The preamble in question, it seems to me, cannot be called in to aid the construction of the enacting clauses; for, although it shows that the object of the incorporation was to insure against losses by fire, and the navigation on the waters of the interior, and de-

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clares these objects to be laudable, yet it adds, "that a company promoting them in the interior of our country, where the profits must necessarily be small, ought to be liberally encouraged." What that encouragement was to be, whether in matters of insurance, strictly, or whether in the grant of additional powers and rights, must be matter of mere conjecture. I must, therefore, read the act as if it were without a preamble, in reference to the points now in question.

The principal attributes of a bank are the right to issue negotiable notes, discount notes, and receive deposits. Have the defendants a right to issue negotiable notes without reference to their right to insure?

The second section of the act forbids their issuing any which grant, or stipulate to pay, annuities upon any life or The fifteenth section provides, that any policy, or *engagement* signed by the president, and attested by the secretary, when done conformably to any by-laws of the directors, shall be valid against, and effectually bind, the said corporation, without the presence of a board of directors, and as effectually as if under the seal of the corporation. The 16th section enacts that no policies or *engagements* whatever, which shall be entered into by the corporation *with any individual, body politic or corporate, shall be transferable, negotiable, or assignable, so as to give such second holder, or assignee, a claim on the corporation, either in his own name, or in the name of the person originally concerned, unless the consent of the corporation shall have been previously obtained, and endorsed in writing on such instrument, or unless such a privilege form a part of the original agreement, and be expressly granted by the corporation. The 18th section prohibits the issuing of any notes, as therein before prohibited.

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I cannot bring myself to doubt, for a moment, that the right of issuing negotiable notes, except in the prohibited case of notes stipulating to pay annuities upon lives, is given with entire latitude, depending on the discretion and will of the corporation. The grant of the power is unlimited and unrestricted. The prohibition not to issue any notes stipulating to pay annuities upon any life or lives, taken in connection with the general grant of power to issue negotiable engagements without restraint, shows that the legislature intended that there should be no restraint or prohibition but in the specified case. And upon the settled principle of construction, an exception to a power otherwise unlimited, shows that it was intended to be limited no further than is expressed in the exception.

It is contended, that the power to issue engagements, contained in the 15th and 16th sections of the act, must be confined to such as may become necessary in the principal business and objects of the incorporation, that is, upon subjects of insurance, and where losses happen, which it is not convenient for the corporation to pay immediately. This argument supposes that all

the powers conferred by the act embrace the business of insurance; and that idea is only to be collected from a part of the preamble, rejecting or overlooking that part of it which declares, that a company promoting the objects before enumerated, where the profits must necessarily be small, should be liberally encouraged.

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The liberal encouragement, it would seem to me, meant some benefits beyond the small profits arising from insurance against fire, and of the navigation on our interior waters. I have already said, that I lay no stress on the preamble, and *all I contend for is, that if it be called in to aid the construction of the act, it must be taken altogether.

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Have the corporation a right to discount notes? The discounting of notes is one mode only of lending money, and that they possess this power, appears to me indisputable. By the ninth section of the act, the directors have express power to call and demand from the stockholders the remainder of all sums by them subscribed, and adequate power is given to enforce the payment: in the same section, the directors are authorized to make and pursue such by-laws, rules, and regulations, as they shall deem proper, and among other things, for the *investment of the funds of the corporation which the business of insurance may not actively employ.*

I know of no technical legal definition of the term *investment*, as applied to money. In common parlance, it means the putting out of money on interest; and, beyond all doubt, the legislature meant that the corporation might put out, or use and employ such part of their funds as the business of insurance did not actively employ; and the plea put in by the defendants alleges that their discounting of notes consists in investing the funds of the corporation, which the business of insurance in the act mentioned did not actively employ, and no otherwise. If the mode of investment, by discounting notes, which is nothing else than lending money on personal security, is not prohibited by the act of incorporation, then it appears to me to be authorized under the general and unqualified power of investing the funds not actively employed in the business of insurance.

This idea derives confirmation from the fifth section of the act, which, after authorizing the stockholders owning two thirds of the stock to discontinue the business of the corporation, makes it the duty of the directors to call in all parts of the funds or capital stock of the corporation *which may have been loaned by the corporation.* The second section of the act forbids their loaning upon bottomry and respondentia; and, as I read the 12th section of the act, the power conferred on the corporation to take and hold mortgages extends only to the taking them when given to secure the payment of the shares subscribed, or to secure the payment of money which, in the course of business, actually becomes *due to the corporation. The 18th section of the act for-

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bids the employment of any part of their funds in buying or selling goods and merchandise, or any funded or other stock, created by act of Congress, or of any particular state; or in buying or selling the stock of any bank, or in loaning any money, or issuing any notes, as therein before prohibited.

It would seem to follow, as a necessary consequence from the general provision, that the corporation might invest such of their funds as the business of insurance might not actively employ, and the denial of the means of investment, unless by lending money on personal security, that such lending is authorized. But the prohibition in the 18th section to the loaning any money, as therein before prohibited, by necessary inference, authorizes the loaning in any case not within the prohibition; and, consequently, the discounting of notes, not being prohibited before, is authorized.

It has been argued, that the proviso to the 5th section of the act operates to prohibit the discounting of notes by the corporation, inasmuch as discounting notes by the defendants is prohibited by the restraining act. The proviso is, "that such investment, by-laws, rules, and regulations, shall not be repugnant to the constitution and laws of this state, or of the *United States*, nor forbidden by this act in the restrictions and prohibitions on this corporation hereinafter contained." The restraining act provides that no person *unauthorized by law shall subscribe to, or become a member, of any association, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business, which incorporated banks do, or may transact, by virtue of their respective acts of incorporation.*

The offence prohibited by this act, consists in subscribing to, or becoming a member of, any association, or proprietor with others of any bank or fund unauthorized by law for banking purposes. But if the subscribing to, or becoming a member, or a coproprietor, of any fund, is authorized by law, then the issuing notes, receiving deposits, and making discounts, is no violation of the act. The act guards against two things; the unauthorized institution *of a fund or bank by an association of individuals, and the making use of that fund for banking purposes. To subject a corporation or individuals to the operation of the act, and to convict them of an offence against it, both circumstances must concur. The fund must be unauthorized, and it must be for the purposes of banking. The statute considers the association by individuals to create, and actually creating, a fund or bank, the principal offence; the purpose for which it is done, if it be in contravention of the act, completes the offence. How, then, can it be said, that this corporation have violated the restraining act, by investing that part of their capital which the business of insurance may not actively employ, when the act of incorporation expressly authorizes a subscription to the stock of the corporation, limits the number of shares to

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two thousand, and fixes them at two hundred and fifty dollars each, and empowers the directors to call it in? If the simple act of loaning money by a corporation legally possessed of a fund, by way of investing their surplus capital, is not an offence against the restraining act, (and I say, with entire confidence, that it is not,) there is an end of the question; for there is no other law which it is pretended has been violated.

The same answer is applicable to the objection against this corporation receiving deposits: there is no express authority in the act of incorporation to receive deposits, as there is to issue negotiable notes, and to loan money; but the act of receiving money as a bailee or trustee for another, is an innocent and harmless act, forbidden by no law, and injurious to no person.

I have, then, examined the act incorporating the defendants, and the restraining act, and if I have taken a correct view of the powers conferred by the former, and have given a just construction to the latter, the defendants stand unaffected by it.

I have totally disregarded all insinuations or suggestions that the legislature, in point of fact, did not intend to grant banking powers. I know of no other rule by which to construe a statute, than to examine it by the words it contains, to give to its expressions a fair and just interpretation, upon the established rules of construction. Courts of law cannot consider the motives which may have influenced the legislature, or their intentions, any further than they are manifested by the statute itself. It is true, that this act of incorporation grants no express power of banking, *eo nomine*; nor is it necessary, to authorize banking operations, that any particular form of expression should be used: it is sufficient if the attributes of banking are conferred.

In considering this case, my opinion does not rest on any implied powers which the corporation possess, merely as a corporation; but is founded on the powers expressly given, and on such as are necessarily implied from the language of the act of incorporation. And, in my judgment, the defendants have a very clear title to enjoy the franchise set forth in their plea.

PLATT, J., being related to some of the defendants, declined giving any opinion.

Judgment of ouster. (a)

(a) Vide *Jackson v. Brown*, 5 Wendell's Rep. 591. *Jackson v. Booth*, 7 Cow. Rep. 17.

ALBANY,
August, 1818.

SMITH
v.
PAGE.

SMITH against PAGE.

P. was seised of two farms, which were bound by a judgment to S. One of the farms P. afterwards sold to W., and the other to T., who, for part of the consideration money, gave to [* 396] P. a bond, conditioned to pay off and discharge the judgment against P. T. neglected to pay off the judgment, and procured R. to advance the money, for the balance due on it, and take an assignment of his security; and afterwards the judgment was assigned to the son of T., who issued an execution thereon, which he caused to be levied on the farm which W. had purchased of P. On motion of W., a rule was granted to stay proceedings on the execution, as it respected the farm of W., until the further order of the Court (a)

IN 1811, the defendant confessed a judgment in favor of the plaintiff, on a bond for 10,000 dollars, conditioned to pay 4,509 dollars with interest. The defendant was, at that time, seised of two farms in the county of *Herkimer*, on which the judgment became a lien. In *January*, 1816, he sold one of the farms to *Daniel Tilden* for 9,000 dollars, and, for part of the consideration, took the bond of T. in the penal sum of 6,000 dollars, conditioned to pay off and discharge the balance then due on the said judgment, being 3,000 dollars. About the same time, *Sylvester Wilcox* purchased *of the defendant the other farm, for 900 dollars, for which he paid, and received a deed with full covenants and warranty. *Wilcox*, being indebted to *Richard Gardenier*, in the sum of 1,000 dollars, gave him a bond with a warrant of attorney to confess judgment, and which was entered up in this Court. *Gardenier* issued an execution on this judgment, by virtue of which the farm purchased by *Wilcox* of *Page* was sold, and G. became the purchaser at the sheriff's sale. *D. Tilden*, being pressed to pay the balance on the judgment in favor of *Smith*, which was about 1,200 dollars, requested R. S. to obtain the money, and take an assignment of the judgment. R. S. accordingly procured the money, and took an assignment of the judgment to himself, to secure the principal due, with the interest and costs. Afterwards, the son of *Daniel Tilden* paid R. S. the money, and took an assignment of the judgment to himself, and caused an execution to be issued on the judgment, and levied on the farm sold by the defendant, *Page*, to *Wilcox*, and by him to *Gardenier*, and which was advertised for sale under the execution.

S. S. *Lush*, in behalf of *Gardenier*, on his affidavit, stating the above facts, and that he verily believed that the son of *D. Tilden* held the said judgment so assigned to him, in trust, for the benefit of his father, now moved, that satisfaction of the said judgment should be entered of record, or for other relief, &c.

The Court refused to order satisfaction to be entered on the judgment, but granted the following rule:—"That the execution be stayed, as far as respects the lands purchased by *Wilcox* of *Page*, until the further order of the Court; and that no costs of the motion be allowed to either party."

(a) Vide *Lansing v. Orcott*, 16 Johns. Rep. 4. *Cloves v. Dickinson*, 9 Coen, 43
Bank of Auburn v. Throop, 18 Johns. Rep. 505.
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ALBANY,
August, 1848.OVERSEERS
OF PITTSTOWNV.
OVERSEERS
OF PLATTSBURGH.

A person who has been imprisoned more than 30 or 60 days, as the case may be, on execution issued on a judgment recovered before a justice of the peace, and recorded with the clerk of the county, under the act extending the jurisdiction of justices of the peace, (sess. 41. ch. 94.) is entitled to his discharge, on the usual affidavit, as to his imprisonment, according to the provisions of the act for the recovery of debts to the value of 25 dollars, passed the 5th of April, 1813, all the provisions of which act are applicable to the act above mentioned, (sess. 41. ch. 94.) except so far as it has otherwise directed. (a)

*In the Matter of HARWOOD, an Imprisoned Debtor.

THE prisoner being brought up on a *habeas corpus*, Hosford moved for his discharge under the "act for the recovery of debts to the value of twenty-five dollars," passed April 5, 1813, (sess. 36. ch. 53. sect. 12. 1 N. R. L. 387.) on the usual affidavit. It appeared that he had been imprisoned for more than 60 days, on an execution issued on a judgment recovered against him under the late act, extending the jurisdiction of justices of the peace to demands over twenty-five dollars, and not exceeding fifty dollars, passed April 10, 1813, (sess. 41. ch. 94.) which provides, that a transcript of the judgment of the justice of the peace may be filed in the office of the clerk of the county, and recorded by him, who is directed to issue execution on such judgment, to the sheriff of the county, &c.

I. Hamilton, contra, contended, that the judgment against the prisoner having been recorded in the office of the clerk of the county, and an execution issued to the sheriff, the justice had no further power or authority in the case, and that the provisions of the act of the 5th of April, 1813, were not applicable to this case.

Per Curiam. The 12th section of the last act (sess. 41. ch. 94.) declares, that the form of proceedings under the act shall be, in all respects, the same as under the aforesaid "act for the recovery of debts to the value of 25 dollars;" and all the provisions of the said act, and the amendments thereto, are declared to apply to this act, except as therein otherwise directed. This clause gives effect to the provisions of the act of April, 1813; and we are of opinion, therefore, that the prisoner is entitled to his discharge.

Prisoner discharged.

(a) *Vido Brooks v. French*, 5 *Wendell's Rep.* 568.

*The Overseers of the Poor of PITTSTOWN against The Overseers of the Poor of PLATTSBURGH.

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MOTION for judgment as in case of nonsuit, for not proceeding to trial, &c. There was an issue in fact, and an issue

issue in law ought to be first determined; but the plaintiff has his election which shall be first tried; and the defendant is not entitled to judgment as in case of nonsuit, for not proceeding to the trial of the issue in fact, while the issue in law remains undetermined.

ALBANY,
August, 1818.

JENKS
v.
PAYNE

in law, both of which were joined in the last *January* vacation. The venue was laid in *Rensselaer* county. The demurrer, it was stated, went to the whole merits of the case, and had not yet been brought on to argument.

It was contended, on the part of the plaintiff, that the motion ought not to be granted, nor ought he to be compelled to stipulate to try the issue in fact until the issue at law was determined; and that the plaintiff had his election to try that issue first. (2 *Tidd's Pr.* 684.)

Mitchill, for the plaintiff.

Walworth, for the defendant.

Per Curiam. Whatever may have been the ancient practice on this subject, yet, according to the later authorities, where there is an issue at law, and an issue in fact, the plaintiff may elect which he will try first; and we think it most proper that the issue in law should be first determined. The defendant cannot, therefore, compel the plaintiff to stipulate to try the issue in fact, before the other issue is disposed of; nor is he entitled to judgment of nonsuit, because the plaintiff did not bring that issue to trial at the last *Rensselaer* circuit. It is as much in the power of the defendant, as in that of the plaintiff, under the rules of the Court, to bring the demurrer on to argument at the earliest term after joinder in demurrer. There is, therefore, no cause for the defendant to object delay on the part of the plaintiff, in not having the demurrer argued at the last term.

Motion denied.

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*JENKS and others *against* J. PAYNE.

If a defendant, living within 40 miles of the place of trial, changes his residence, permanently, to a place beyond that distance, before issue is joined in the cause, he will be entitled to fourteen days' notice of trial; but if he change his residence after issue joined, he is entitled to eight days' notice.

MOTION, on the part of the defendant, to set aside the verdict, and all subsequent proceedings in the cause. The venue was laid in the county of *Cortlandt*, where the defendant was arrested. He, afterwards, and before the declaration was delivered, removed with his family to *Whitestown*, in the county of *Oneida*, a distance of more than fifty miles from his former residence, and where he has since continued to live. The cause was noticed for trial at the last *June* circuit in *Cortlandt* county, at which an inquest was taken by default; but the notice being for less than *fourteen* days, a motion was now made to set aside the inquest for irregularity.

Donnelly, for the plaintiffs.

A. Payne, for the defendant.

Per Curiam. The defendant, when he was arrested, resided within 40 miles of the place of trial; but before issue was joined in the cause, he removed from *Cortlandt* county, to a greater distance, and has since permanently resided at *Whitestown*. It does not appear that the defendant absconded from his former place of abode. He was, therefore, entitled to 14 days' notice of trial. If, however, he had removed beyond the distance of 40 miles, after issue joined in the cause, he would have been entitled only to eight days' notice. And such is the practice of the Court of K. B. in *England*. (2 *Tidd's Pr.* 593. *Spencer v. Hall*, 1 *East, Rep.* 683.)

ALBANY,
August, 1818.

KENT
v.
M'DONALD

Motion granted. (a)

(*) Vide *Lloyd v. Hooper*, 7 *East*, 624. *Douglas v. Ray*, 4 *Term Rep.* 552.

*KENT against M'DONALD.

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N. WILLIAMS, for the defendant, moved for judgment as in case of nonsuit. It appeared that an interlocutory judgment had been entered, for want of a plea, in *August*, 1817, since which the plaintiff had not proceeded to have his damages assessed, nor taken any steps in the cause. The defendant had been surrendered by his bail, and had been in custody for more than two terms.

Where the plaintiff, after obtaining an interlocutory judgment, neglected to proceed further, for more than two terms, a rule was granted, on motion of the defendant, that the plaintiff execute his writ of inquiry in 30 days, or be non prossed.

Marcy, contra, read an affidavit, stating, that the plaintiff resided in the province of *Maine*, and he did not know by whom he could prove his demand; that the defendant was insolvent, and unable to pay even the costs of suit.

Per Curiam. Take your rule, that the plaintiff proceed to execute his writ of inquiry of damages in *thirty* days, or that he be non prossed.

Motion granted.

END OF AUGUST TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN OCTOBER TERM, 1818, IN THE FORTY-THIRD YEAR OF OUR
INDEPENDENCE.

GARDNER *against* CAMPBELL.

Replevin will not lie against an officer who, having levied upon and taken goods in execution, receives from the defendant the amount due on the execution, and then refuses to re-deliver the goods.

A person taking the goods of another, under lawful authority, does not become a trespasser *ab initio*, by refusing to restore them, after his authority to detain the goods is determined.

(a)
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A mere non-scanence will not make a man a trespasser *ab initio*.

THIS was an action of *replevin*, for taking certain goods and chattels of the plaintiff. The defendant pleaded to the declaration, which was in the ordinary form, 1. *Non Cepit*;

2. An avowry, setting forth that the defendant, on the 31st of December, 1817, was under sheriff of the county of Cortlandt, on which day a *fi. fa.* directed to the sheriff of Cortlandt was issued out of this Court, against the plaintiff, at the suit of Aaron Benedict, for 3,132 dollars, debt, and 14 dollars and 43 cents, damages and costs; that the writ was delivered to the defendant to be executed, who, thereupon, and before the return day thereof, levied upon the goods in question, continued in possession of them until the twelfth of January, 1818, and sold them, on the tenth of January, to satisfy the execution.

3. An avowry, stating the execution and levy, and that the defendant continued in possession of the goods until the twelfth of January, 1818.

4. A cognizance, as bailiff of the sheriff of Cortlandt, setting forth the execution, levy, and sale.

*The plaintiff pleaded, 1. to the first avowry, that before the taking of the goods and chattels mentioned in the declaration, and while the *fi. fa.* was in the defendant's hands, to wit, on the seventh of January, 1818, he settled with the defendant as

(a) Vide *Dunham v. Wyckoff*, 3 Wendell's Rep. 230. *Hall v. Tuttle*, 2 *Ibid.* 476. *Marshall v. Davis*, 1 *Ibid.* 109. *Judd v. Fox*, 9 Cow. Rep. 253. *Clarke v. Skinner*, 20 Johns. Rep. 465. *Mills v. Martin*, 19 Johns. Rep. 32. *Morris v. Dewitt*, 5 Wendell, 71. *Gates v. Lounsbury*, 20 Johns. Rep. 427.

to the *fi. fa.*, and found that there was due and owing thereon 734 dollars and 4 cents, including sheriff's fees, which the plaintiff tendered to the defendant, and which the defendant accepted in satisfaction and discharge of the execution.

2. A similar plea to the second avowry.

3. To the first and second avowries, that on the seventh of January, 1818, one *Barney*, at the request of the plaintiff, tendered and paid to the defendant the sum of 734 dollars and 4 cents, being the amount then due and owing on the execution, including sheriff's fees, which sum the defendant accepted, and gave a discharge in full satisfaction of the execution.

4. and 5. To the cognizance, the plaintiff pleaded a settlement with, and payment to the defendant, by himself, and by *Barney*, at his request, as in his first and third pleas.

To the second plea the defendant replied, denying a settlement and payment of the amount due on the execution; and as to the first, third, fourth, and fifth pleas, there was a demurrer and joinder. The cause was submitted to the Court without argument.

SPENCER, J., delivered the opinion of the Court. The first objection to the pleas is, that they admit the original caption to be lawful, and that when that is the case, *replevin* does not lie.

In the case of *Hopkins v. Hopkins*, (10 Johns. Rep. 372.) this Court adopted the well-known and ancient principle, that when a person acts under an authority or license given by the law, and abuses it, he shall be deemed a trespasser *ab initio*; but the action is grounded on a tortious taking; and *The Six Carpenters' case* (8 Co. 146.) recognizes a distinction between the actual and positive abuse of a thing taken originally by authority of the law, and a mere nonfeasance, such as a refusal to deliver an article distrained.

The conclusive objection to all the pleas is, that, confessedly, the defendant took the plaintiff's goods, under and by virtue of an execution; and they are, in the language of this Court, in *Thompson v. Button*, (14 Johns. Rep. 86.) in the custody of the law, and it would be repugnant to sound principles to permit them to be taken out of such custody, when the officer has found them in the possession of the defendant in the execution, and taken them out of his possession.

The pretence set up here is, that the execution was paid and satisfied. Whether it was or not, makes no difference in the principle. If the fact be true, the plaintiff is not without his redress; he cannot be allowed to set up that fact to divest the sheriff's possession; the goods were lawfully taken by the defendant, and *replevin* is not the appropriate remedy. If it were allowed, the execution of the writ of *fieri facias* might, in all cases, be delayed or eluded.

Judgment for the defendants.

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Oct. 1818.

GARDNER
v.
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NEW-YORK,
Oct. 1818.

GAGE

v.

REED.

If the parties in a justice's Court agree to try the cause on its merits, this does not preclude the defendant, who was sued for a debt contracted by his wife before marriage, from objecting, on *certiorari*, to the non-joinder of his wife, although he did

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not insist on the non-joinder in the Court below; but he did not waive the objection; and the agreement applies only to formal and technical objections.

A husband cannot be sued for a debt contracted by his wife *dum sola*, without her being joined as defendant; the cause of action surviving against her; and the non-joinder of the wife is a sufficient ground for arresting the judgment. (a)

GAGE *against* REED and another.

IN ERROR, on *certiorari* to a justice's Court.

The defendants in error brought an action, in the Court below, against the plaintiff in error, for goods sold and delivered, in the year 1815, to *Sally Green*, who afterwards became the wife of the defendant below. The defendant pleaded the general issue. At the trial, in the Court below, the defendant stated, that he was under twenty-one years of age; and his father, who was present, assenting to that fact, the justice appointed the father his guardian, with the defendant's assent. It was agreed between the parties, that the cause should proceed to trial on its merits. The account of the plaintiffs below against *Sally Green*, prior to her marriage with the defendant below, was admitted by the *guardian, and it was attempted, without success, to substantiate a set-off in her favor. No motion was made for a nonsuit, nor was any objection raised on the ground of the non-joinder of the wife of the defendant below, nor was any objection taken on account of the defendant's infancy. Judgment was rendered in favor of the plaintiffs below.

Per Curiam. The judgment is erroneous; for although the defendant below did not insist on the non-joinder of his wife, he did not waive that objection. The agreement to try the cause on its merits, was a waiver only of formal and technical objections, and would operate no further than to cure defects of that nature.

The only foundation for the liability of the defendant below, was his marriage with *Sally Green*; and it is well settled, that the husband alone cannot be sued for a debt contracted by his wife before marriage; for in the event of his death, the cause of action survives against her. The case of *Mitchinson v. Hewson* (7 Term Rep. 348.) is directly in point. The suit there was against the husband alone, for work and labor done for his wife, before marriage. The plea was the general issue, and a verdict was found for the plaintiff; and on a motion in arrest of judgment, the Court said, that, according to the best authorities on the subject, the action against the husband alone could not be supported, observing, that the case of *Drew v. Thorn* (*Alley*, 72.) was directly in point; and they arrested the judgment. Whatever is a good cause for arresting a judgment, is a good cause, also, for reversing it.

Judgment reversed.

(1) But where the wife is improperly joined, if the plaintiff has a cause of action against the husband, he will be permitted to enter a *nolle prosequi* as to the wife. *Whitbeck v. Cook*, *infra*, 483.

NEW-YORK,
Oct. 1816.MARTIN
V.
HAWKS.*MARTIN *against* HAWKS, Sheriff of Otsego.

THIS was an action of debt for an escape. The declaration stated, that the plaintiff, in this action, in August, 1816, recovered a judgment, in an action of trespass, assault, battery, and false imprisonment, in this Court, against *Jeremiah Robinson*, for 77 dollars and 44 cents; that a *ca. sa.* was issued thereon, and delivered to the defendant, on the 2d of November, 1816, who, on the 30th of November, arrested *Robinson*, and on the same day voluntarily suffered him to escape. The defendant pleaded *nil debet*, with notice of a release from the plaintiff. The release was dated the 27th of November, 1818, and was as follows:—"I hereby discharge the sheriff in the above (the original) suit, and direct him not to proceed any further with the *ca. sa.* against the said *Jeremiah Robinson*, in my favor, but to return the same satisfied, as I have received in full of the debt, and costs on the same. In witness, &c." The cause was tried at the *Otsego* circuit, before Mr. J. Platt.

At the trial, the counsel for the plaintiff offered to prove that the amount of the judgment against *Robinson*, with the exception of six cents, was due to *Ambrose L. Jordan*, the plaintiff's attorney in the original suit, as taxable costs; that when the *ca. sa.* was delivered to the defendant's deputy, this fact was expressly stated, and the deputy was required to pay the amount, when collected, to the attorney, and not to the plaintiff; that the deputy, after the arrest of *Robinson*, suffered him to go at large, on his promising to pay the money in a few days; and that *Robinson* had been required to pay the amount of the judgment to *Jordan*, and not to the plaintiff. The plaintiff's counsel, also, offered to prove that the release, which was executed after the escape had been suffered, was executed by fraud and collusion between *Robinson*, the plaintiff, and the sheriff, for the purpose of preventing the attorney from collecting his costs. Upon this statement, the judge nonsuited the plaintiff. It was now moved to set aside the nonsuit, and the case was submitted to the Court without argument.

SPENCER, J., delivered the opinion of the Court. It is fully settled, by a long series of decisions, that Courts of law will

The attorney has a lien on a judgment recovered by his client, for his costs; and if the defendant, after notice from the attorney, pay the amount of the judgment to the plaintiff, without satisfying the attorney for his costs, such payment is in his own wrong, and he is liable to the attorney for the amount of his bill.

Where an assignee recovers a judgment in the name of his assignor, and takes out a *ca. sa.* giving the sheriff notice of his equitable interest, and the sheriff, having arrested the defendant, suffers him to escape, the assignee may maintain an action against the sheriff, for the escape, in the name of the assignor, which the sheriff cannot defeat, by taking a release from the nominal plaintiff.

A plaintiff obtained a judgment against a defendant for six cents damages, with costs. The plaintiff's attorney gave notice to the defendant, to pay the amount of the judgment to him, and not to the plaintiff, and issued a *ca. sa.*, and directed the sheriff to pay over the money, when collected, to him, and not to the plaintiff, the attorney being entitled to the whole amount of the judgment, except six cents, as his costs. The defendant was arrested; and the sheriff voluntarily suffered him to escape. The attorney (a) brought an action for the escape against the sheriff in the name of the

[* 406] original plaintiff; Held, that the sheriff could not avail himself of a release from the original plaintiff, in bar of the action, such release being a fraud upon the attorney, as it was executed, with notice to all the parties

of his lien for his costs.

1a) Vide *M Farland v. Crary*, 6 *Wendell's Rep.* 297. *Bradt v. Koon*, and *Lawrence v. Bradt*, 4 *Cox Rep.* 416. *Power v. Kent*, 1 *Cowen*, 172.

NEW-YORK,
Oct. 1813.

MARTIN
v.
HAWKS.

take notice of, and protect, the rights of assignees, against all persons having either express or implied notice of the trust. (*Johns. Dig.* 40, and the cases there collected.) It is equally well settled, that the assignor of a chose in action cannot defeat a suit brought in his name, by his assignee, by a release to the defendant, who has notice of the assignment.

If *Jordan* stands in the situation of an assignee, and if *Martin* is to be regarded as the mere trustee to *Jordan*, for the amount of the judgment against *Robinson*, then, most assuredly, *Martin* could not, by his release, defraud his *cestuy que trust* of the money to which he was entitled.

In the case of *Pinder v. Morris*, (3 *Caines's Rep.* 165.) this Court recognized the principle, that if the defendant pay to the plaintiff the debt and costs, after notice from the attorney of the plaintiff not to do so, he pays the costs in his own wrong. We referred to *Doug.* 238. 4 *Term Rep.* 123. 6 *Term Rep.* 361, as establishing that position.

Lord *Mansfield* held, in the case of *Welsh v. Hole*, (*Doug.* 238.) that an attorney had a lien on the money recovered by his client, for his costs; and that, if the attorney gave notice to the defendant not to pay, till his bill should be discharged, a payment by the defendant, after such notice, would be in his own wrong, and like paying a debt which has been assigned after notice.

In the case of *Read v. Dupper*, (6 *Term Rep.* 361.) Lord *Kerion* said, the principle had been settled long ago, that the party should not run away with the fruits of the cause, without satisfying the legal demands of his attorney, by whose industry and expense those fruits were obtained. If *the money, he says, had been paid over, *bona fide*, to the plaintiff before notice from the attorney, such payment would have been good; but when it is made in violation of the notice, it cannot be good; and he sanctions Lord *Mansfield's* comparison of the case to that of an assignment of a chose in action; and in *Griffin v. Eyles*, (1 *H. Bl.* 122.) the same principle was adopted. In *Turwin v. Gibson*, (3 *Atk.* 719.) Lord *Hardwicke* held that the attorney, in consideration of his trouble, and the money disbursed for his client, has a right to be paid out of the duty decreed for the plaintiff, and has a lien upon it; and that such was constantly the rule of the Court.

It will be observed, that the question now before the Court is not whether the lien of the attorney for his costs is superior to the equity of a defendant, who has a matter of set-off existing against the plaintiff: a different rule has been adopted by this Court in such a case.

If the attorney has a lien on the judgment for his costs, and if he stands in the same equity that he would have done, had the judgment been assigned to him, then I am at a loss to discover why he should be defrauded of that lien, and divested of that equity, when all the parties to this transaction were in

formed of his lien, and forbidden to do any act which should prejudice it.

The sheriff, by suffering *Robinson* to go at large, was inevitably fixed with the debt. (1 *Johns. Cas.* 411.) He never could retake the prisoner. Being thus fixed, and to avoid his responsibility, he avails himself of what he had been directed not to do. He takes *Martin's* discharge of the judgment, knowing that no part of it belonged to him, except six cents, and he shelters himself under the release, which *Robinson* also obtained fraudulently; for the case states, that he had been notified not to pay *Martin*. (a) *Martin*, too, was guilty of a fraud, in discharging the execution; for he well knew that he was entitled to no part of it, except the nominal amount of six cents.

Now, it seems to me, that where a discharge has been thus obtained, by fraud in all the parties to it, it cannot be operative, as respects any of the parties; and that we should not be going further than we have already gone in several cases, in treating the discharge as fraudulent and void.

It may be objected, that *Jordan*, the attorney, is not to be regarded as having a lien on the action for the escape, inasmuch as that is a *tort* not assignable. His claim to a right to prosecute this action grows out of his lien and equity in the original action; and, therefore, it is no answer to this action to say, that it cannot be assigned. See to what a length that objection will go; the assignee of a bond, having given notice to the obligee not to pay it, sues on it, and obtains judgment. He takes out a *ca. sa.*, and when he gives it to the sheriff, notifies him that the debt is his, and to pay it to him only. The sheriff arrests the defendant, and permits him to escape; and then, to avoid his liability, takes a release from the nominal plaintiff. Will this protect him? If it does, then, indeed, the principle that a Court of law will notice and protect the assignee of a chose in action, amounts to nothing.

I hold, that he must be protected throughout, and that it would be just as inequitable to suffer him to be cheated out of the fruits of the judgment, as it would be to suffer the assignor to cheat him out of the means of obtaining a judgment. The Court are, therefore, of opinion, that the judge erred in nonsuiting the plaintiff, and that the nonsuit must be set aside, with costs, to abide the event.

Motion granted.

(a) *Raymond v. Squire*, 11 *Johns. Rep.* 47, *acc.*

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*WALDEN AND WALDEN *against* SHERBURNE AND EAKIN

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A. and B., citizens of the United States, having been in partnership in France, agreed, in September, 1806, to dissolve that partnership; and that B. should establish himself in New-York, A. remaining in France; that they should exert themselves to procure consignments from the United States; that A. should ship goods to B.;

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the amount of which, and such sum as B. could procure by association, loan or credit, were to be converted into reasonable advances on goods consigned to A.; that on shipments made by A. to the United States, by order of B., B. should receive one third of the profits, and that B. should have one third of the commissions on consignments from the United States to A.;

that a statement of their respective accounts was to be made at the end of each year, and that if one of the parties had incurred losses, that the other was not to be answerable for them, beyond a forfeiture of the profits of the year. According to this agreement, B. established himself as a merchant in New-York, and having contracted debts in relation to his business: Held, in an action against A. and B., that by this agreement they were partners, there being a community of profit and loss; that as the debt, being principally for money lent, had relation to the partnership concerns, the plaintiff was entitled to recover; and that it was not necessary for him to show that the money lent or credit given was used for the benefit of the partnership; and that the stipulation limiting the extent of the liability of each of the partners for losses incurred by the other, although valid between themselves, could not affect other persons.

Where one of two partners executes a bond for duties on goods imported, with a surety, and the surety advances his co-obligor money with which he pays the bond, he may maintain an action against both the partners for the money lent, this being a partnership transaction; although had the surety himself taken up the bond, he could only have brought an action for money paid, against the partner who executed it.

An admission by one partner, after dissolution of the partnership, of a balance due from the firm, does not bind the firm; but entries made by one of the partners, during the partnership, in a book of accounts, are admissible evidence against both. (a)

If a party in a cross, to substantiate a credit in his own favor, produce an account made out by the opposite party, he renders it evidence against himself in the first instance; but he is still at liberty to disprove the charges in the account.

Interest is due on a balance of account from the time it is liquidated; and it is to be considered as liquidated when rendered, if no objections be made to it. When a verdict is taken subject to the opinion of the Court, the Court may draw the same conclusions from the evidence as the jury ought to have done. (b)

(a) *Gresham v. Clark*, 9 Cow. Rep. 51. *Baker v. Stackpole*, *Ibid.* 420. *Hopkins v. Banks*, 7 *Ibid.* 650.

(b) *Wood v. Hickok*, 2 *Wendell's Rep.* 501. *The People v. New-York*, 5 Cow. Rep. 231. *Reid v. The Rensselaer Glass Factory*, 3 Cow. Rep. 393. *Rensselaer Glass Factory v. Reid*, 5 *Ibid.* 587. 3 *Cow. Rep.* 393. *Whitney v. Sterling*, 14 *Johns. Rep.* 215. *Tucker v. Ives*, 6 *Coven.* 193.

Sherburne engages to ship, from time to time, such goods as may be deemed suitable for sale in the *United States*, directed to the said *Eakin*, for account of himself, for such *American* citizens as he may point out.

“3. The said *Eakin* engages to convert all such amounts, likewise any sum he may be able to command, arising from association, loan, or credit, into reasonable advances on goods consigned for sale to the house of the said *Sherburne*; the said *Eakin* taking the needful precaution of causing insurance to be effected thereon.

“4. All shipments of goods made by order of said *Eakin*, and to his address in the *United States*, shall be for his account and risk; but it is hereby agreed, that one third of the net proceeds arising from the sales of said goods, (if any there are,) after deducting two and a half per cent. commission, shall be carried to the credit of said *Sherburne's* account.

“5. On all consignments of goods received from the *United States*, whether arising from shipments made directly to the said *Eakin*, or from his friends, in consequence of his influence, and exertions, or orders, the said *Sherburne* hereby agrees to account with the said *Eakin* for one third of the net commissions arising from such consignments; and it is further understood, that the present conditions shall be made reciprocal.

“6. When shipments of goods are deemed prudent to be made by the said *Eakin*, on his own account, consigned to the said *Sherburne*, it is hereby agreed that the present voluntary and mutual exchange is to take place.

“The said *Sherburne* shall receive one third of the net *profits, when any there are, on such adventures, and the said *Eakin* one third of the net commission arising therefrom, for each of which the respective accounts of the parties shall be credited; and in order that no misunderstanding, on discussion, may take place on this head, it is expressly agreed and obligatory on both parties, that on the 31st day of *December*, in every year, a letter should be written, copied, and addressed to each other, announcing the sum for which the respective accounts are credited, for such share of profits or commissions gained during the year. It is furthermore agreed on between the parties, that the foregoing arrangement, as regards a repartition of profits and commissions, is assimilated to the principles of a *commandite*, that is to say, if any losses should arise on such adventures, they shall be deducted from the account of profits made in the year; and in case they should exceed these last, no further responsibility can be laid on the said *Sherburne* than the forfeit of profits made; and, in like manner, if any losses should happen to the said *Sherburne*, in consequence of such consignments received, either by guaranty, or any other direct cause, then the said *Eakin* only to be liable to contribute the eto for as much as may be due him, arising from the same species of profits made in the

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NEW-YORK, year, the result of all which shall be respectively made known
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"7. The accounts concerning adventures per *Julia Ann* and *Franklin* being the only remaining to settle, the said *Eakin* engages to settle the same in the *United States*, and in case of a loss thereon, (which we have no reason to expect,) it shall be deducted from the gross amount of first profits, arising from our future concerns.

"8. All other accounts existing between the contracting parties being settled and acknowledged this day, and the present instrument being specially to regulate our future concerns, we have signed it double to this effect, at *Nantes, Septemb. r 30th, 1806.*"

The plaintiffs produced and proved an account current between them and *Eakin*, on which there was the following endorsement, in the hand-writing of, and subscribed by *Eakin*:—
[* 412] "I do hereby certify the foregoing to be a true account *with Messrs. *Jacob and Thomas Walden*, and myself, and that there is a balance due them of five thousand eight hundred and two dollars, fifty-four cents, and which has been contracted since my connection with *Samuel Sherburne* of *Nantes. New-York, September 15, 1808.*" It was admitted, that after the foregoing agreement between the defendants was entered into, *Sherburne* continued at *Nantes*, and transacted general business in his own name, and *Eakin* removed to *New-York*, and conducted business in his own name. In order further to establish the existence of a partnership between the defendants, the plaintiffs produced in evidence *Sherburne's* account current with *Eakin*, and a number of letters from *Sherburne* to *Eakin*, during the years 1807 and 1808, the period during which they were contended to be in partnership, in which letters the agreement of *September 30, 1806*, is frequently referred to and recognized; but as the Court did not consider these letters, or those of *Eakin* in answer to them, as of any material importance, it is thought unnecessary to state their contents, except that in a letter from *Sherburne* to *Eakin*, dated *Nantes, 30th of May, 1808*, he says:—

"I have received your several letters, &c. Their contents treat generally on the subjects of the misfortunes of the country at large, of yours individually, owing to the violent measures adopted by the powers at war, and finally of the several drafts you have drawn on me, for all which I am extremely sorry, and particularly of your confidence of drawing me into the common ruin. You have calculated on too much complaisance on my behalf, even admitting my means were adequate to your object; and after a mature consideration of the present state of affairs, and prospect of duration; of the statement you have made of your business; the deficiency and little prospect of your being able to redeem your losses; and, finally, that even by advancing a share of the sum you require, without the whole, would not
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alleviate your situation, I have taken the determination not to accept your drafts. This resolution is founded principally on the present state of non-communication and annihilation of all commerce, and it was one of the articles *of our convention, that 'no bills are to be drawn on each other without funds in hand.' In consequence of what is said heretofore, I shall consider all our concerns at an end, and beg you will cease all exertions in favor of my commercial establishment." By an endorsement on the letter, it appears to have been received on the 18th of *August*, 1808. The letters from *Eakin* contained advices of bills which he had drawn on *Sherburne*, several of which were in favor of the plaintiffs.

The defendants produced in evidence an account, entitled as follows:—"Messrs. *Sherburne and Eakin*, in account current with *Jacob and Thomas Walden*," in the hand-writing of the plaintiff *T. Walden*, in which the defendants were charged, on the 1st of *February*, 1817, with a balance of 4,405 dollars, 20 cents, and were credited with the sum of 663 dollars, 37 cents, on the 28th of *December*, 1811. There were also other credits, as well as charges, arising subsequently to the account rendered to *Eakin*, and not included therein. The plaintiffs objected to the admission of the credit of 663 dollars, 37 cents, on the ground that a suit had been brought by *Sherburne* alone, against the plaintiffs, for that item, and was still pending; but the judge admitted the defendants to the benefit of the credit for that sum.

It appeared that some of the bills, mentioned in the account, drawn by *Eakin* in favor of the plaintiffs, upon *Sherburne*, were given in payment of money advanced by the plaintiffs to *Eakin*. The counsel for the defendants objected to the allowance of the damages claimed in the account current, on the bills returned under protest, on the ground that the plaintiffs, under the circumstances, were not entitled to damages, and, if they were, they could not recover them under any count in the declaration. The judge admitted the objection, but gave leave to the plaintiffs to strike out the bills, and the moneys paid on account of them, from both sides of the account current.

The plaintiffs, also, produced in evidence a waste-book, which was proved to be in the hand-writing of *Eakin*, and a number of entries were read from it, both by the plaintiffs and defendants. It appeared that the plaintiff *T. Walden* *had become surety with *Eakin*, in several custom-house bonds, given for duties on goods imported, and which, when they fell due, were taken up by *Eakin*, but that the plaintiffs had lent and advanced him money for this purpose; and it was contended that the money thus lent was not recoverable in this action; but the judge ruled otherwise, provided the jury should find the existence of a partnership. A verdict was taken for the plaintiffs, by consent, for 5,000 dollars, subject to the opinion of the

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Court on a case, and the damages were to be increased or diminished as the Court should direct.

Griffin, for the plaintiffs. 1. There was a general partnership between the defendants, when the demand of the plaintiffs arose, in 1806. To make *Sherburne* liable as a partner, it is sufficient to show that he shared in the profits of the joint concern. Whether the profits be more or less, can make no difference. The evidence of the fact of general partnership arises from the articles of partnership, from general reputation, and from entries in the books of account.

The limitation in the articles, of the liability of the parties to the amount of profits, though it may be conformable to the law of *France*, is of no force here, except between the parties themselves. An *American* house of trade must be governed by the laws of this country. (*Robinson v. Bland*, 1 *Wm. Bl. Rep.* 234. 256. *Smith v. Smith*, 2 *Johns. Rep.* 235. *Thompson v. Ketcham*, 4 *Johns. Rep.* 285. 8 *Johns. Rep.* 189.)

2. As regards third persons dealing with a partnership, it makes no difference, as to the responsibility of the partners, whether the partnership is general or limited; or whether the partner who receives the money or property applies it to the partnership account or not. It is enough that the transaction is in the name of the partnership, and that the advance is made on its *credit*; unless some collusion is shown between the plaintiffs and the partner. One partner may bind the firm, without its consent, by a simple contract, *not relating to the partnership*, if he deal in the name of the partnership, with a person who has no notice that he is dealing on his separate account. (*Montagu on Partnerships*, *23. 8 *Vesey*, 540. 7 *East*, 210. 13 *East*, 175. 1 *Campbell*, *N. P. Rep.* 185.)

Again; there was a general existing partnership between the defendant and *E.* in and prior to 1806, and there is no other evidence of its dissolution than the letters between the parties. These may be sufficient for that purpose, as between them; but, in regard to third persons, such a private agreement can have no effect. There should be either a personal notice to persons dealing with the firm, or a public notice in the gazette.

Then, as to the proof of the advances made by the plaintiffs to the firm. The account current rendered by them, and produced by the defendants, is sufficient evidence. It contains all the plaintiffs claim, and by introducing it as evidence, the defendants, *prima facie*, have admitted the justness of the charges. They are concluded by it, unless they wholly disprove the items. The plaintiffs, therefore, must recover the balance as stated. (*Randle v. Blackburn*, 5 *Taunt. Rep.* 245. *Philips's Law of Ev.* 79.)

3. The letters from *Eakin* to *Sherburne* were not admissible evidence. By reading the letters from *S.* to *E.*, the plaintiffs

did not sanction or admit the answers of *E.* to *S.*; nor are they to be concluded by them. This, however, is not a material point, except so far as the defendants may rely on the correspondence, as evidence that there was no partnership. If, in that view, it should become necessary to examine it, it will appear to be a most extraordinary and mysterious correspondence; intended, in consequence of the difficulties attending a commercial intercourse with *Europe*, to veil the true situation of the parties.

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4. It may be objected, that the declarations of *E.* were not admissible evidence to charge *S.* It is not necessary to combat this objection, as it may be thought to impeach the case of *Whitney v. Ferris*; (10 *Johns. Rep.* 66.) though Lord *Eilenborough*, in *Evans v. Drummond*, (4 *Esp. N. P. Rep.* 89.) did admit the declarations of *C.*, with whom the plaintiff dealt, to charge *D.* as his secret partner. Thus much, however, must be conceded, that, having first established the connection in business or partnership between the parties, the declarations of one of them is evidence to bind both.

*5. It will be said, that the money lent *E.* to take up the custom-house bonds, for which *T. W.*, one of the plaintiffs, had become surety, is not recoverable; and the case of *Tom v. Goodrich* and others, (2 *Johns. Rep.* 213.) will be relied on as an authority in support of this objection. But that case proceeds on the strict technical ground of a payment by a surety of a bond executed by one of the partners and himself. This case is clearly distinguishable. The plaintiffs did not take up the bond, or pay the money, to relieve themselves as sureties. *E.* himself took up the bond, and the bond was introduced merely to show that he applied the money, lent by the plaintiffs, to the use of the partnership; it being admitted that the goods imported, for the duties on which the bond was given, were for the account of the partnership.

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S. Jones, jun., contra. There was no partnership between *E.* & *S.* after the 30th of *September*, 1806. There had been a limited partnership between them in *France*, where they resided, which being dissolved, they agreed to establish two distinct and wholly independent houses, one in *France*, and the other in the *United States*, for the sole object of transacting commission business. In regard to every other business, each was at perfect liberty to carry it on as he pleased, for his own individual benefit. They were partners only in cases of consignment from one to the other, in the profits arising from the sales. It is like the case of two persons purchasing goods and selling them on their joint account, where the joint concern or partnership is limited to that particular object. A special or limited partnership may exist, and the responsibility of the parties is confined to their contracts in regard to such particular business. (a) (*Lansing v. Gaine & Ten Eyck*, 2 *Johns. Rep.*

(a) Vide *Waller v. Chambers*, *Courp.* 814, per Lord Mansfield.

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300. *Livingston v. Roosevelt*, 4 *Johns. Rep.* 256. *Dubois v. Roosevelt*, *ib.* note. *Watson on Partners*, 54. 184.) If any doubt exists on this point, it is removed by the conduct of the parties. S. continued to do business in *France*, in all other respects, on his own separate account. The correspondence *between S. & E. contains no evidence of a general partnership. They had no motive for concealment, or to wrap their concerns in mystery. One of the letters, *December 3d*, 1807, is confidential, sent by a friend, and, therefore, not exposed to accident. The mere declarations, or acts, of one person, are no evidence to charge another, or to show a partnership. (10 *Johns. Rep.* 66.) The Court, it is true, in *Whitney and another v. Sterling and others*, (14 *Johns. Rep.* 215.) allowed evidence of general reputation, connected with corroborating circumstances, to be evidence, *prima facie*, that B. was a partner of H. S. & Co.; but there notice had been given to produce the articles of copartnership, which the defendants refused to do. Where articles of copartnership are, in fact, produced, general reputation can avail nothing.

In *Livingston v. Roosevelt*, (4 *Johns. Rep.* 278.) *Kent*, Ch. J., observed, that, "where the business of a partnership is thus defined, and publicly declared, and the company do not depart from that particular business, nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement on any other than a partnership account. There must be some authority beyond the mere circumstance of partnership to make such a contract binding. Were it otherwise, it would be idle, and worse than idle, to talk of limited partnerships, in any matter or concern whatever." The plaintiffs have been aware of the necessity of showing, not only that the advance was made to one of the partners, but that the money was applied to the use of the copartnership.

The letter of the 14th of *October*, 1806, from S. to the plaintiffs, gave them notice that the partnership, before existing between S. & E., was dissolved, and referred the plaintiffs to E., who was coming to *New-York* to establish himself there. The dissolution of the former partnership, and each party establishing a distinct house of trade in their separate names, is evidence that the former partnership did not exist or continue. If they intended to be partners, why not continue their former firm? By the new agreement, all shipments to *France*, by E., were to be on his own account *and risk; and all shipments by S., to the *United States*, on his own account and risk. Each was to bear the loss, if any, on their respective shipments. They were to be jointly concerned in the profits only, if any should arise, from sales. The plaintiffs were well acquainted with the business and transactions of E., who traded in various ways not comprehended in the articles of agreement between him and S. The plaintiffs, then, were bound to show that all their advances

to *E.* were for the special object of the partnership, and were applied to that object.

The special partnership, if any existed, was finally terminated by the letter of *S.*, of the 30th of *May*, 1803, to *E.*, and received by him the 10th of *August* following. As the plaintiffs have not given credit to *S.*, as a partner, since the first notice of the dissolution, they can have no claim against him for advances made since he ceased to have any interest in the profits of *E.*'s business, even without notice of that fact.

But it is said, that the account current of 1807, rendered by the plaintiffs against *S. & E.*, and produced by *S.*, is conclusive against him; but it was a mere copy of an account rendered to *E.* Besides, the admission of one partner, after a dissolution of the partnership, cannot bind his copartner. In *Huckley v. Patrick*, (3 *Johns. Rep.* 536.) the Court decided that the acknowledgment of the balance of an account by one partner, who was authorized, on the dissolution, to settle the accounts of the partnership, did not bind his copartner. Now, the acknowledgment endorsed on the account, by *E.*, was subsequent to the dissolution.

Again; it is said that the entries in the waste-book of *E.* are evidence; but they can amount to no more than his private declarations. That was the private book of *E.*, and contained entries of his business, generally, subsequent to, as well as during, his connection with *S.*

Again; the moneys charged by the plaintiffs, as advanced to *E.*, to take up the custom-house bonds on which they were sureties for *E.*, cannot be recovered against *S.*, admitting him to be a partner. The case of *Tom v. Goodrich* (2 *Johns. Rep.* 213.) is decisive on this point. The bond, *being executed by *E.* alone, was his private debt, for which *S.* is not liable.

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As to the *interest* on the account, *S.*, if liable at all for the debt, ought not to pay interest until after the demand made of him, in *February*, 1817.

T. A. Enmet, in reply. By their agreement, *S.* and *E.* were to share the profits on all goods reciprocally shipped for sale; and on all goods consigned, they were to share in the commissions. The dissolution of the former general partnership was merely nominal, and was obviously intended to protect the property of the concern from *British* capture. The letter of *S.* to the plaintiffs, in which he announces the dissolution, and refers them to *E.*, made the latter an agent to state the nature and extent of the connection.

Again; the advances by *E.* to *S.* constituted a partnership concern. *S.* could control all the *profits* of the adventures. Partnerships carried on here are not to be governed by the laws of a foreign country, or the peculiar laws of *France*. The letter of *S.*, of the 30th of *May*, 1808, in which he refuses to accept bills, refers to an article of their agreement not found in that of *September*, 1806. The language of the correspondence between

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S. and *E.* is not that of persons acting separately and distinctly, and writing to each other; but is that of one person writing to another, about matters in which they have a common interest and concern.

Reputation is admissible as to partnership; and where the parties live in the same place, it is strong evidence; but reputation, connected with other circumstances, is sufficient evidence. There does not appear any intention on the part of *S.* to conceal the fact of his being a partner of *E.*, as it regards creditors, but merely for the sake of guarding against the effect of *British* capture. His letter authorized *E.* to make full disclosures and declarations, as to their connection, to all persons with whom he wished to transact business. In his letter, also, of *April*, 1808, in which he speaks of the transaction with *Bell & Co.*, he says, that in case the debt is paid, *E.* should be credited his share of the profits.

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In *Wood and others v. Braddick*, (1 *Taunt. Rep.* 104.) *the Court of *C. B.*, in *England*, decided, that the admission made by one of two partners, after a dissolution of the copartnership, as to what took place during the partnership, was competent evidence to charge the other partner. *Heath*, J., said, that the dissolution operated only as to the future, not as to things past, with respect to which the partnership continues, and always must continue. (a)

This is, undoubtedly, the true principle, though it is true, that this Court, in *Hackley v. Patrick*, thought otherwise.

The case of *Tom v. Goodrich* turned on the technical rule of law as to sealed instruments, and as to principal and surety; but the plaintiffs, as partners, were not sureties of *E.* *T. W.* signed one bond, and *J. W.* another.

SPENCER, J., delivered the opinion of the Court. The verdict being taken by consent, subject to the opinion of the Court, we must draw such conclusions from the evidence as we think the jury ought to have drawn. The principal inquiry is, whether the defendants were general partners, in consequence of the agreement between them, of the 30th of *September*, 1806. Regarding the whole of that instrument, the circumstances of the times, and the conduct of the parties under it, I feel no hesitation in saying they were general partners. It appears, by the recital to the agreement, that the defendants had been partners in a commercial house at *Nantz*, in *France*, from *May*, 1804. That partnership they agreed to dissolve; and for the purpose of promoting the general as well as individual interest of each party, they further agreed to establish a commercial house in *New-York*. It is to be observed, that both the defendants were *American* citizens, and the articles under consideration contemplate that *Eakin* was to reside at *New-York*, and *Sherburne* in *France*.

(a) Vide *Simpson v. Geddes*, 2 *Bay's Rep.* 533. *S. P.*

The first article of the agreement states, that the principal object of their respective establishments was intended to procure consignments on commission from the *United States*; and they pledged their honor to use their best endeavors in the attainment of that object.

*By the second article, *Sherburne* engages to ship, from time to time, such goods as may be deemed profitable for sale in the *United States*, directed to *Eakin*, for account of himself, for such *American* citizens as he may point out.

By the third article, *Eakin* engages to convert all such amounts, likewise any sum he may be able to command, arising from association, loan, or credit, into reasonable advances on goods consigned for sale, to the house of *Sherburne*; *Eakin* taking the precaution of insuring.

By the fourth article, all shipments of goods made by order of *Eakin* shall be for his account and risk; but one third of the net profits arising from the sales of the goods, after deducting two and a half per cent. commissions, was to be carried to the business credit.

The fifth article provides, that all consignments of goods received from the *United States*, whether from shipments made directly from *Eakin*, or from his friends in consequence of his influence and exertions or orders, *Sherburne* agrees to account with *Eakin* for one third of the net commissions arising from such consignments; and it is declared to be understood that this condition should be made reciprocal. The sixth article stipulates, that when a shipment of goods is deemed prudent to be made by *Eakin*, on his own account, consigned to *Sherburne*, a mutual exchange is to take place; and the articles proceed to arrange how the net profits and commissions are to be divided. *Sherburne*, in such case, is to receive one third of the net profits, and *Eakin* one third of the net commissions. They also agree, that if losses should arise on such adventures, they are to be deducted from the amount of the profits made in the year; and they agree not to be answerable for the losses on shipments beyond the profits made in the year. These are all the stipulations material to this inquiry.

It is very manifest, from the whole agreement, that the defendants meant to keep out of sight the fact that there was to be a commercial establishment, in which both were interested, in *France*; that all goods going to and from *France* were to appear to be owned by *Eakin*, who was domiciled here, to avoid the risk of *British* captures; but in all the adventures, whether from *America* or *France*, both *of them were to have the stipulated profits and commissions, in a manner promoting the reciprocal interests of each. No principle is better established, than that every person is to be deemed in partnership, if he is interested in the profits of a trade, and if the advantages which he derives from the trade are casual and indefinite, depending on the accidents of trade. (2 *Wm. Bl. Rep.* 947. 998.) To con-

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stitute a partnership, a community of profits and loss is essential, the shares must be joint, though it is not necessary they should be equal. (1 H. Bl. 37.)

By the 3d article of the agreement, it was contemplated by both the defendants, that *Eakin* was to exert his credit in making advances on goods consigned to the house of *Sherburne* for sale, and both of them were to participate in the profits and commissions. This puts it beyond all doubt, not only that the defendants were partners, but that *Eakin* had a right to borrow money, to advance the interests of the firm.

It has been contended, that the defendants were limited, not general partners; and that, therefore, *Sherburne* was not bound for the advances made to *Eakin*, as it did not appear that they were made to promote the direct and specified objects of the partnership. All partnerships, in one sense, are limited. They have particular branches of trade in view: none embrace all the varieties of trade. All that is requisite to render a debt contracted by one of the partners binding and obligatory on the others, is that the debt relate to the partnership. The authority delegated by one partner to another, is to act in the course of their particular trade or line of business; and in such transactions, strangers have a right to act on the credit of the partnership fund. It is not necessary that the money lent, or credit given, should appear to have been actually used for the benefit of the partnership: third persons have no concern with that. This principle is strongly exemplified in the case of *Bond v. Gibson and Jephson*; (1 Camp. N. P. Rep. 185.) there, one of the partners, with the intention of cheating the other, went to the plaintiff's shop, and purchased a great number of articles which might be used in the partnership business, and instantly converted them to his separate use. It was a fair sale *in the ordinary course of business. Lord *Elliott* held, that unless the seller is guilty of collusion, a sale to one partner, with whatever view the goods may be bought, and to whatever purposes they may be applied, is a sale to the partnership.

The letters from *Sherburne* to *Eakin* by no means tend to disprove the fact of the existence of a partnership. Considering the necessity for caution, lest their correspondence might be intercepted, the letters are not incompatible with a partnership. Indeed, they seem to me to take an interest in the business which *Eakin* was doing, indicative of a concern in it; and *Eakin's* letters convey the same idea; although I do not consider these letters of any material importance, for, in my judgment, the plaintiff's case does not require them.

With regard to the stipulation in the articles of agreement, that the losses on shipments should be deducted from the profits of the year, and that the partner not making the shipment should be no further answerable; this was a valid agreement as between the partners, but cannot affect any person dealing with the partnership. If the transaction was in the ordinary course

of business, and attached on the partners, they are answerable to the whole extent of their fortunes.

It has been objected, that moneys lent to pay the custom-house bonds are not chargeable upon the partnership, inasmuch as one of the plaintiffs was a surety, in those bonds, for *Eakin* only. The case of *Tom v. Goodrich and others* (2 Johns. Rep. 213.) has been cited and relied on, in support of this objection. That case would have applied with decisive effect, had the custom-house bonds been paid by the plaintiffs; but they do not make the bonds the ground of their demands. They were paid by *Eakin*, with money lent and advanced by the plaintiffs. This money was applied by *Eakin*, one of the partners, to pay a partnership charge. Had the money been advanced for the same purpose, by any other person, no doubt could have existed, as to the liability of the defendants; and the plaintiffs did not advance the money to relieve themselves from the bonds, *or because they had become chargeable; but it was money lent in the course of business. The objection is untenable.

It has been strongly insisted, that the plaintiffs did not produce sufficient evidence to prove the items of their account. On the 15th of September, 1808, *Eakin*, by his certificate, endorsed on an account current, made out by the plaintiffs, and charged against him alone, admitted a balance to be due the plaintiffs, for 5,302 dollars, 54 cents; which he further certifies to have been contracted since his connection with *Sherburne*. This balance was admitted, after the dissolution of the partnership, which took place on the 18th of August, 1808; for, on that day, *Eakin* received *Sherburne's* letter, dissolving the connection. According to the decision of this Court, in *Hackley v. Patrick and another*, (3 Johns. Rep. 536.) one partner cannot, after a dissolution, bind his copartner by acknowledging an account, any more than he can give a promissory note to bind him. It seems that the Court of Common Pleas, in *England*, have held otherwise; (1 Taunt. 104.) but I believe there is more safety in the rule of this Court than in a contrary one.

It appears to me, that the proof of the account is fully made out. The waste-book, in the hand-writing of *Eakin*, was proved, and given in evidence. This I take to be an original book of entries, made at the time the transactions took place; and this book contained credits for all the plaintiff's account. The existence of the partnership being established, it follows, that an admission of the account, by one of the partners, during the continuance of the partnership, is competent proof. Besides, the case states, that the plaintiff's account against *Eakin* was proved, and read in evidence. Now, this account is precisely the account against both defendants; and if proved, the proof avails against both.

Again; the defendant *Sherburne*, to gain a deduction from the plaintiff's account, produced the account himself; and by doing so he made it evidence. He might, indeed, contradict,

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or disprove it; but not doing so, it was evidence in the cause, to the jury. (5 *Taunt.* 245.)

The only remaining question is as to the interest. We have uniformly decided, that after an account has been liquidated, *it carries interest, and that an account is to be considered liquidated after it has been rendered, if objections are not made to it. In the present case, the account was rendered to one of the defendants on the 15th of *September*, 1808, and not objected to: indeed, it was admitted. From that period the plaintiffs are entitled to interest.

Judgment for the plaintiffs, accordingly.

MYERS AND BELLINGER *against* MORSE.

In an action of *assumpsit*, where the declaration sets forth an agreement to answer for the debt, default or miscarriage of a third person, the defendant may plead the statute of frauds specially in bar.

Where the plaintiff promises not to require from the defendant the payment of a certain note, in consideration of [* 426]

which the defendant promises to indemnify the plaintiff from one third of all loss in consequence of his enforcement of

THIS was an action of *assumpsit*. The declaration contained two counts:

1. For money paid, laid out and expended by the plaintiffs, to the use of the defendant. 2. That on the 19th of *May*, 1815, the plaintiffs were liable as the endorsers of a certain promissory note drawn by *Horace Morse*, and made payable to the plaintiffs, at the bank of *Utica*, and by the plaintiffs endorsed to the bank; that the plaintiffs were holders, as endorsees, of a certain other promissory note, drawn by *Horace Morse*, and made payable to the defendant at the bank of *Utica*, which note the defendant had, before the day above mentioned, endorsed to the plaintiffs; and that the plaintiffs, at the special request of the defendant, promised the defendant that they would not require from him the payment of the money mentioned in the said note; and the defendant, in consideration thereof, on the same day, promised *the plaintiffs to indemnify them from one third of all loss which they might sustain in consequence of their having endorsed any note or notes for *H. M.*, in the *Utica* bank. The plaintiffs averred that they have not required payment of the said note, but have cancelled the same, and that they have sus-

certain notes for a third person, this is not a case within the statute of frauds, here being a new and original consideration moving between the contracting parties.

A declaration in *assumpsit* stated a promise from the plaintiffs to the defendant not to require the payment of a certain note, endorsed by the defendant to the plaintiffs, in consideration whereof the defendant promised the plaintiffs to indemnify them from one third of all loss which they might sustain in consequence of their endorsement of certain notes for a third person; that the plaintiffs had never required payment of the note, and that they had sustained a loss to a certain amount: Held, that the declaration was bad, in not stating that the third person was insolvent, otherwise there was no consideration for the defendant's promise, either of benefit to himself, or of loss to the plaintiffs: besides, the insolvency of the maker of the note must be averred, because the promise of the defendant must be construed to mean that he would pay third part of the loss, provided it could not be recovered of the maker of the notes, and not merely that the defendant should be liable, in the first instance, for one third of the loss. (a)

(a) Vide *Gallager v. Brunel*, 6 *Conn. Rep.* 346. *Farley v. Cleveland*, 4 *Conn. Rep.* 432. 8 *C. & C.* 639.

tained a loss to the amount of 600 dollars, in consequence of having endorsed the said notes for the said *H. M.*, of which the defendant had notice, and that, by reason of the premises, he became liable to pay to the plaintiffs 200 dollars, being the third part of the said loss, when requested; and that the defendant, being so liable, promised, &c., and although often requested, hath not paid, &c.

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The defendant pleaded, 1. *Non assumpsit*. 2. To the second count, that the plaintiffs ought not to have and maintain their action, because, by the statute of frauds, it is enacted, that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of any other person, unless such agreement, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized; that the plaintiffs have brought their action for the default of *H. M.*, and for no other purpose whatever, and that there is no agreement in writing, touching the promise of the defendant, or memorandum or note thereof, &c. To the second plea there was a general demurrer, and the defendant joined in demurrer.

The cause was submitted, on the points stated to the Court, without argument.

SPENCER, J., delivered the opinion of the Court. The first objection taken to the plea is, that it amounts to the general issue, and is therefore bad. It may well be doubted whether the plaintiffs can avail themselves of this objection under a general demurrer. (1 *Chitty's Pl.* 498, and the cases there cited.) But upon principle, the plea is well pleaded if the promise laid in the second count is not a valid promise, unless it be in writing. The rule is this; in an action of *assumpsit*, matter which shows that no such contract was made, cannot be pleaded; but matter which admits the contract as laid, but shows that it was not binding in point of law, may be pleaded, because, it being matter of law, it is proper to show it to the Court. (1 *Chitty's Pl.* 497. 499. *Bacon's Abr. Plead. G.* 3 *Gilb. C. P.* 62. 66.)

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This opens to the inquiry, whether the promise set forth in the second count is within the statute of frauds and perjuries or not. I think this a case not affected by that statute, for, according to the principle laid down in the case of *Leonard v. Vredenburg*, (8 *Johns. Rep.* 39.) where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly-contracting parties, it is not a case within the statute. In the case of *Skelton v. Brewster*, (8 *Johns. Rep.* 376.) the same principle was again adopted by the Court.

The plea, then, is undoubtedly bad; but though bad, it authorizes the defendant to go back and examine the declaration, to see if it be good.

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Although the defendant's promise is not a collateral, but an original one, there must be a consideration for that promise; this is stated to be the defendant's liability, as an endorser on a promissory note, given by *Horace Morse*, payable to the defendant, and endorsed by him, which note came to the plaintiffs by endorsement; and on their promising the defendant not to require of him the payment of that note, the defendant, in consideration of the premises, promised to indemnify the plaintiffs from one third part of all the losses, in consequence of endorsing, or having endorsed, all notes of *Horace Morse*; and the gravamen of their case is, that they paid 600 dollars, in consequence of endorsing *Morse's* notes.

The defendant was only contingently liable to pay the note he had endorsed for *Morse*, that is, on the failure of the maker to do so. It ought to have been stated that *Morse* was insolvent, and unable to pay that note, or else there is no consideration for the defendant's promise, either of benefit to him, or loss to the plaintiffs. The allegation that the plaintiffs have sustained a loss by endorsing *Morse's* notes, is liable to the same objection. The promise, if valid and binding, must be construed to mean, to pay to the plaintiffs one third of such sum as they should lose by endorsing *Morse's* notes; *that is, one third of what they should be obliged to pay, and which could not be recovered of *Morse*, owing to insolvency, not one third of what they should pay, and which might be recovered of him. There is no allegation that *Morse* was unable to refund to the plaintiffs any money which they may have paid as endorsers of his paper. I consider these objections as insurmountable, and that, therefore, the defendant must have judgment, with leave to the plaintiffs to amend, on payment of costs.

Judgment for the defendant.

FARRINGTON AND SMITH *against* SINCLAIR.

Where a creditor levies, under an execution, upon the property of his debtor, consisting of a ponderous article not easily removable, and allows it to continue in his possession, this is not, *per se*, evidence that the execution and levy were fraudulent, so as to render the property liable to be levied on, under a junior execution against the same debtor; but if the creditor permit the debtor to consume the property, being fire-wood, this is a ground for suspicion of fraud; and to prove the fraud, the creditor in the junior execution may produce evidence of a permission given to the debtor to use other property levied upon at the same time. (n)

If the officer who made the first levy, brings an action of trover against the parties who were engaged in the second levy, they may show circumstances of fraud to defeat the action, equally as if it had been brought by the creditor himself.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action of trover, in the Court below, against the plaintiffs in error, for taking a quantity of fire-wood, which had been levied on by the plaintiff below,

(a) *Farrington v. Canwell*, *infra*, 430.

who was a constable, by virtue of an execution in favor of one *Caswell*, against one *Peter Payne*, and which was afterwards levied on by the defendant *Smith*, a constable, under a junior execution, in favor of the defendant *Farrington*, against *Payne*. At the trial, it was proved that the plaintiff having levied on a wood-pile, at *Payne's* door, *Caswell*, the judgment creditor, told *Payne's* family that they might continue to use the wood for fuel in *Payne's* tavern, for four fires. They continued to use the wood, for ten days, or a fortnight, when the defendant *Smith* levied, under *Farrington's* execution, upon such of it as remained, and carried it away. In order to show fraud in the prior execution and levy, the defendants below offered to prove that *Caswell* gave permission to the family of *Payne* *to make use of other property levied on at the same time with the wood; but the evidence was objected to, and excluded by the justice. A verdict was found for the plaintiff below, on which judgment was given.

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Per Curiam. The mere omission, for a few days, to remove the wood, it being a ponderous article, was not, *per se*, sufficient evidence of fraud; but the permission given by *Caswell*, the creditor, to consume it for four fires, in *Payne's* tavern, excited a just suspicion, that the proceeding was merely to cover the property; and, after such a foundation was laid, the justice ought to have admitted the other evidence offered by the defendants below. It is no answer to say, that this was an action by the constable who levied, and that the fraud, if any, must be imputed to *Caswell*. If the real design of *Caswell* was to protect the property of *Payne* against other creditors, he shall not succeed in that attempt, by employing the constable as an instrument of his fraud.

Judgment reversed.

FARRINGTON AND SMITH *against* SINCLAIR.

IN this case, which was between the same parties, the facts were precisely the same as in the preceding case, except that the property levied upon was a barrel of pork, which *Caswell* consented should be left in *Payne's* possession, and used by his family, who consumed about one quarter of it, when it was levied upon by *Smith*, under an attachment at the suit of *Farrington* against *Payne*.

Per Curiam. This is a strong case of constructive, if not actual fraud, and the judgment must be reversed.

Judgment reversed.

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If the creditor in the prior execution levy upon provisions belonging to his debtor, and permit them to remain with the debtor, and be consumed in his family, the execution and levy are, constructively, if not actually, fraudulent, as against a subsequent attachment or execution.

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Where a party purchasing goods levied upon under an execution which he has issued, suffers them to remain in the possession of his debtor, this is *prima facie* evidence of fraud, as against a subsequent execution.

Where the creditor in the prior execution, brings an action of trover against the parties engaged in the subsequent levy, under a junior execution, they may, to establish the fraud, produce evidence that the plaintiff permitted other property of the debtor, levied upon at the same time with that which is the subject of the action, to continue in his possession.

*FARRINGTON AND SMITH *against* CASWELL.

IN this case, the action was brought by *Caswell*, the creditor, in the prior execution mentioned in the two preceding cases, who produced no evidence, at the trial in the Court below, to show why he had left the property in the possession of *Payne*. The defendants below offered to prove, that the plaintiff gave liberty to *Payne's* family to use other property levied on at the same time with that which was in question in the present action, in order to show that the purchase by the plaintiff of the property sold under his execution, was colorable and fraudulent. This evidence was excluded, and a verdict and judgment were given for the defendant in error.

Per Curiam. The continued possession of the goods in *Payne* was *prima facie* evidence of fraud, as against creditors; and here was no evidence to repel that presumption. The evidence offered by the defendants below was pertinent, and ought to have been submitted to the jury.

Judgment reversed. (a)

(a) Vide *Whipple v. Foot*, 2 Johns. Rep. 418. *Putnam v. Wyley*, 8 Johns. Rep. 435. *Burnell v. Johnson*, 9 Johns. Rep. 243. *Storm and Beckman v. Woods*, 11 Johns. Rep. 110. In *Kidd v. Rawlinson*, 1 Bos. & Pull. 59. (cited in *Putnam v. Wyley*, 8 Johns. Rep. 435.) the purchaser under the *fi. fa.* was a third person, and not the creditor who issued the writs, and it was held, that his permitting the debtor to continue in possession of the goods, was not fraudulent, as respected another creditor, to whom the debtor afterwards assigned the same goods in payment. (S. C. 3 Esp. Rep. 52.) And it has been held, that where the creditor himself purchased at the sheriff's sale, and let the goods to the former owner, for a rent, which was actually paid, he had a title which could not be impugned as fraudulent by other creditors having executions against the same defendant. *Watkins v. Birch and another*, 4 Taunt. 823. But the circumstances of no money having been paid by the purchaser, under the execution, or rent by the lessee of the goods, are evidence of fraud to be left to the jury. *Reed v. Blades and another*, 5 Taunt. 212.

† *Jennings v. Carter*, 2 Wendell's Rep. 446.

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*FARRINGTON AND SMITH *against* JOHN PAYNE.

IN ERROR, on *certiorari* to a justice's Court.

This was an action of trover, brought by the defendant in error, against the plaintiffs in error, for three bedquilts. The

The misrecital by a justice of the peace, in the return to a *certiorari*, of the title of the act for the recovery of debts to the value of twenty-five dollars, will be disregarded.

A tortious taking is, in itself, a conversion, and no subsequent demand is necessary, in order to maintain an action of trover.

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defendants below justified under an attachment, in favor of the defendant *Farrington*, against *Peter Payne*, for debt, by virtue of which, the defendant *Smith*, as constable, seized and carried away the bedquilt. The articles were proved to be the property of the plaintiff below, but they were attached while in the possession of *Peter Payne*, against whom the attachment issued, having been lent to him. The defendants below, when serving the attachment, were notified that these articles were not the property of *P. Payne*; but they persisted in seizing and removing them. A verdict and judgment were rendered for the plaintiff below, and two objections were now raised on the part of the plaintiffs in error:

1. That the summons and all subsequent proceeding are stated in the return to have been by virtue of the act, entitled, "*An act for the more speedy recovery of debts to the value of twenty-five dollars*," which was repealed in April, 1813; and, in the new revised act, the words "*more speedy*" were omitted.

2. That the plaintiff below made no demand of the goods before suit; and that no conversion was proved.

Per Curiam. In giving "judgment according as the very right of the case shall appear, without regarding any imperfection, omission, or defect in the proceedings, in mere matters of form," we are authorized to disregard the mistake in the title of the statute, under which the justice acted.

As to the second objection, it is well settled, that a tortious taking is, in itself, a conversion, and no subsequent demand is necessary

Judgment affirmed.

*FARRINGTON AND SMITH *against* J. PAYNE.

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IN ERROR, on *certiorari* to a justice's Court.

This was an action of trover between the same parties as in the preceding case, to which the same justification was pleaded. The cause was adjourned, by consent, and at the adjourned day, the defendants below asked for a second adjournment, and offered to give security, and to swear that they could not safely proceed to trial for want of a material witness; but they refused

Where there has been a trespass or conversion by one single indivisible act, in relation to several chattels, the plaintiff cannot split his claim for damages, by bringing separate

actions of trespass or trover for each particular article seized or converted; and a recovery for one part or parcel is a bar to an action for another part or parcel. (a)

Where the cause has been once adjourned in a justice's Court, by consent, and the defendant then applies for a second adjournment, on account of the want of a material witness, but does not show that due diligence had been used to obtain the witness, and refuses to disclose who or where the witness was, it is proper for the justice to refuse the adjournment. (b)

(a) Vide *Butler v. Wright*, 2 *Wendell's Rep.* 369. *Miller v. Covert*, 1 *Ibid.* 487. *Phillips v. Berick*. 16 *Johns. Rep.* 136.

(b) *St. John v. Benedict*, 12 *Johns. Rep.* 418.

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to name the witness, or to say where he resided. The justice denied a further adjournment.

The defendants then pleaded, that since issue had been joined in this cause, judgment had been rendered against them in another action, for the same act and subject matter complained of in the present suit. The judgment referred to by the plea, was that in the preceding case between the same parties. On the trial, the same evidence was produced, by the plaintiff below, as in the last case, with this addition, that when the defendants below took the three bedquilts there mentioned, they also took the bed. The proceedings and judgment in the former suit were admitted. A verdict and judgment were given for the defendant in error, for the value of the bed, with costs.

Per Curiam. The justice decided correctly in refusing the second adjournment, as there was no proof of due diligence, and as the party refused to explain who, or where, the witness was.

Upon the main question of this cause, we are clearly of opinion, that the judgment in the first suit was a bar to the plaintiff's claim in this action. The only evidence of a conversion was the tortious taking under the attachment. The seizure of the bed, and the bedquilts which then lay on the bed, was one single indivisible act; and the plaintiff ought not to be permitted to vex the defendants, by splitting up his claim for damages into separate suits for each article so *seized. There is no difference in this respect between the actions of trover and trespass. In *Smith v. Jones*,† the Court decided, that where goods were sold at one time, on an entire contract, the vendor could not maintain separate suits for separate parcels of the goods so sold and delivered. There is no reason for a difference in the rule between torts and contracts. Suppose a trespass, or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel? The judgment must be reversed.

Judgment reversed.

FULTON against MATTHEWS AND WEDGE.

A surety is not discharged by the plaintiff's giving time to the principal debtor, or even by his discontinuing a suit commenced against the principal, without the privity and consent of the surety, unless the surety has explicitly required him to proceed against the principal, or the plaintiff has, by some agreement with the principal, precluded himself from suing him. (a)

THIS was an action of *assumpsit* on a promissory note, dated October 25th, 1815, by which the defendant *Wedge* promised

(a) Vide *Reynolds v. Ward*, 5 *Wendell's Rep.* 501. *The People v. Russell*, 4 *Ibid.* 570. *Niblo v. Clark*, 3 *Ibid.* 21. *Clark v. Niblo*, 6 *Ibid.* 236. *Cumpton v. M'Nair*, 1 *Ibid.* 457. *Moakley v. Briggs*, 19 *Joins. Rep.* 69. *King v. Baldwin*, 17 *Joins. Rep.* 384. *Andrus v. Bealls*, 9 *Coven.* 693.

to pay *W. Atherton*, or order, 85 dollars, by the first of *January* next, with interest. The note was signed by *Wedge*, and underneath his name was subscribed the name of the defendant *Matthews*, in the following manner:—"Thos. Matthews, security." On the note was endorsed an assignment from the payee to the plaintiff, dated *November 11th*, 1817. The cause was tried before *Mr. J. Platt*, at the *Steuben* circuit, in *June*, 1818.

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On the part of the defendant *Matthews*, who alone had been brought into Court, it was proved, that in the autumn before the note became due, *Wedge* called on the payee, and offered to pay him 50 or 55 dollars, on account of the note, in *Pennsylvania* bank notes; but as they were depreciated in value, *Atherton* declined taking them, and promised to wait until the next spring for payment. In *July*, 1816, *Atherton* placed the note for collection in the hands of an attorney in *Steuben* county, who commenced a suit upon it in the Court of Common Pleas of that county, in which suit *Matthews* pleaded, and a default was entered against *Wedge*. Before any trial in the cause, *Atherton* took the note out of the hands of the attorney, and directed him to desist from proceeding in the suit, in consequence of which, *Atherton* afterwards became nonsuited. It did not appear that *Matthews* was privy to this transaction. *Wedge*, who had previously been solvent, was, at the time the former suit was suspended, reputed to be insolvent, and afterwards obtained his discharge under the insolvent law, and had since left the state.

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A verdict was found for the plaintiff, subject to the opinion of the Court, and the case was submitted, on the points and arguments stated to the Court, without argument.

SPENCER, J., delivered the opinion of the Court. This suit is on a negotiable note, signed by *Wedge*, and by *Matthews*, to whose signature is attached the word "security."

The defence relied on was, that the payee of the note, after it became due, and before it was endorsed, had given time to the principal, and that a suit had been brought by the original payee of the note, in *Steuben* Common Pleas, which suit was, afterwards, discontinued; and that, probably, had the suit proceeded, a recovery might have been had against *Wedge*, who is now insolvent, and has left the state. It does not appear that *Matthews* ever requested the payee, or the plaintiff, to sue *Wedge*.

In *Pain v. Packard*, (13 *Johns. Rep.* 174.) we say, that a mere delay in calling on the principal will not discharge the surety; and in that case, the opinion of the Court was placed wholly on the fact, that the surety requested the holder of the note to proceed and collect it from the principal; and the plea averred a loss of the money as against the principal, by such neglect. In this case, there is no proof whatever, that *Matthews*, the surety, ever urged, or requested, the holder of the note to proceed against

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the principal; and the proof is very doubtful whether, when the suit was actually commenced in the Common Pleas, *Wedge* was able to pay the money.

The holder of a note ought to be fairly and fully apprized by the surety that he is required to prosecute the principal. A delay to sue, or even a discontinuance of a suit *brought, cannot absolve the surety from his liability, if he is passive, and takes no measures indicating to the holder of a note, that he insists on his proceeding against the principal. It ought to be put beyond a doubt, that the surety is injured by the delay, that is, that the principal was solvent, and able to pay the debt, if he had been prosecuted for it. The plaintiff has done no act to preclude himself from suing *Wedge*, at any time. On the grounds, then, that the plaintiff has never been required to prosecute *Wedge*, and that he has made no contract with him, that disables him from suing at any time, we are of opinion that the plaintiff must have judgment.

Judgment for the plaintiff. (a)

(a) Vide *King v. Baldwin and Fowler*, 2 Johns. Ch. Rep. 554. In *Orme v. Young* (Holt's N. P. Rep. 84.) Gibb's, Ch. J., says, "The defence which may be set up by a surety, of time given to the principal, is borrowed from a Court of equity; there, if a day of payment be given to the debtor, the sureties are discharged. It is the equitable right of sureties to come into a Court of equity, and demand to sue in the name of the creditor. Now, if the creditor have given time to his debtor, the surety cannot sue him." And he adds, "What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining; not exacting the money at the time; but it is the act of the creditor depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a Court of equity for relief; because, the principal having tied his own hands, the surety cannot release them." Et vide *Hunt v. United States*, 1 Gallis, Rep. 32. per STORY, J.

[* 436] *Overseers, &c. of PITTSBURY against Overseers, &c. of PLATTSBURGH.

The overseers of the poor of the town of Plattsburgh, in the county of

THIS was a special action on the case. The declaration stated, that on the 8th of August, 1815, one *Elijah Briggs*, a pauper, obtained an order of two justices of that county, adjudicating the legal settlement of a pauper to be in *Pittsborough*, in the county of *Rensselaer*, and ordering his removal thither; and he was accordingly removed to *Pittsborough*. The pauper had no legal settlement in this state. The overseers of the poor of *Pittsborough* appealed to the Court of General Sessions of the Peace of the county of *Clinton*, who quashed the order of removal; but the overseers of the poor of the town of *Plattsburgh* refused to remove the pauper back to *Plattsburgh*, or provide for him, and maintain him at *Pittsborough*, he being sick and unable to be removed; and he had, subsequently to the reversal of the order, been maintained by the overseers of *Pittsborough*, who brought an action on the case against the overseers of *Plattsburgh*, to recover their expenses. &c., and set forth the above facts in their declaration. Held, on a demurrer to a special plea of the defendants, that the action was maintainable, on the principle that a burden had been unjustly thrown upon *Pittsborough* by the procurement of the overseers of the poor of *Plattsburgh*, and as the pauper had no legal settlement in this state, it was their duty to exonerate the overseers of *Pittsborough* from the burden which they had cast upon them. But whether the plaintiffs and defendants could sue or be sued in their private capacity for their own official acts, or those of their predecessors? *Quære*. (b)

(b) Vide *Palmr v. Vandenberg*, 3 Wendell's Rep. 193. *Grant v. Fancher*, 5 Cow. Rep. 309. *Overseers of Pittsborough v. Overseers of Plattsburgh*, 13 Johns. Rep. 407.

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pauper, having no legal settlement in this state, and being destitute of property, and wholly unable to support himself, was residing in *Plattsburgh*; that *Nichols* and *Falmer*, two of the justices of the peace of the county of *Clinton*, upon complaint made to them by the defendant *Morse* and one *Burk*, then overseers of the town of *Plattsburgh*, that the pauper, not having any legal settlement in that town, had come to reside therein, and was likely to become a charge to the town, did adjudge the complaint to be true, and did likewise adjudge that the lawful settlement of the pauper was in the town of *Pittstown*, in the county of *Rensselaer*; and made an order dated the 8th of *August*, 1815, directed to any constable of the town of *Plattsburgh*, reciting the complaint and their adjudication thereon, and ordering the removal of the pauper to the town of *Peru*, thence to the town of *Chesterfield*, and, in like manner, by the nearest and most convenient route, to the town of *Pittstown*, the constable of which town was required to receive the pauper, and to carry and deliver him to the overseers of the poor of *Pittstown*, who were required to receive the pauper, and provide for him as an inhabitant of the town of *Pittstown*. And the plaintiffs aver, that from the day of the date of the said order unto the time of the commencement of this suit, they have been overseers of the poor of the town of *Pittstown*; that by virtue of the before-mentioned order, the said justices, the defendant *Moore*, and the said *Burk*, on the 26th of *October*, 1815, caused the pauper to be removed to *Pittstown*, and delivered to the plaintiffs; that the plaintiffs received the pauper, and provided, and have continued to provide for him food, &c., from the time of their receiving him, until the commencement of this suit; that believing themselves aggrieved by the order, they appealed to the next Court of Sessions of the county of *Clinton*, to be holden on the second *Tuesday* of *May*, 1815, at *Plattsburgh*, and that such proceedings were had thereon, that, at that *May* term of the said Court, the order appealed from was ordered to be quashed, and the defendants were ordered to pay to the plaintiffs twenty-five dollars costs, which order of the Court of Sessions remains unreversed; of all which proceedings the defendants had notice; and that *Briggs*, from the time of his removal from *Plattsburgh* until the time of the commencement of this suit, has continued to be a pauper, having no legal settlement in this state, and wholly destitute of property, and unable to support himself. The plaintiffs further averred, that from the time of delivering the pauper to them, and until the time of the commencement of this suit, he was, and has continued to be, so sick, lame, and infirm, that he could not be removed from *Pittstown* to *Plattsburgh* or elsewhere, without endangering his life, and exposing him to sudden death; that the defendants were overseers of the poor of the town of *Plattsburgh* from the time of quashing the order of removal until the time of the commencement of this suit; and although the defendants, as overseers of *Plattsburgh*, ought and were bound,

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within a reasonable time after the determination of the appeal, and quashing the order of removal, and after they had notice thereof; and although it was their duty, as such overseers, within such reasonable time, either to remove the pauper from *Pittstown*, or to take care of, relieve and maintain him during his sickness and lameness; and although a reasonable time for that purpose had elapsed; and although the defendants, on the 1st of *June*, 1816, and often afterwards, were requested by the plaintiffs either to receive the pauper from *Pittstown*, or to take care of, relieve and maintain him during his sickness and lameness; yet that the defendants, not regarding their duty, but craftily, subtly and fraudulently intending *to injure the plaintiffs, and compel them to support the pauper, have refused, and still do refuse, to take care of, relieve or maintain him; by means whereof the plaintiffs have been unjustly, wrongfully and fraudulently injured, and compelled and obliged to pay a large sum of money, to wit, the sum of 1,000 dollars, in and about the taking care of the pauper and furnishing him with food, &c., and have been put to great trouble and expense in endeavoring to cure his sickness and lameness.

The defendants severed in their pleas, and pleaded respectively, 1. Not guilty. 2. That the pauper was born in *Pittstown*, and, at the time of his removal, was legally settled in the town of *Hoosick*, in the county of *Rensselaer*; without this, that from the time of his removal from *Plattsburgh*, until the time of the commencement of this suit, the said *Briggs* was a pauper, having no legal settlement in this state, and concluded to the country.

The plaintiffs demurred specially to the second plea of the defendants, who joined in demurrer.

Mitchell, in support of the demurrer. 1. The plea is a technical traverse, with an *absque hoc*. It is radically bad. It is double; stating two independent facts. (3 *East*, 346.) The *absque hoc*, which is the strongest negative, cannot be followed by a negative. It would amount to an affirmative. (1 *Inst.* 126. a. 1 *Chitty*, Pl. 576.)

Again; it contains new matter, and concludes to the country, when it ought to conclude with a verification. (1 *Saund.* 103. note. 1 *Salk.* 4. 1 *Burr.* 317. *Doug.* 91. 412. 2 *Johns. Rep.* 428.)

2. But it will be objected, that the declaration is bad. In the case of *The Overseers of Tioga v. The Overseers of Seneca*, (13 *Johns. Rep.* 380.) the Court seemed inclined to think that *assumpsit* would not lie on the implied promise resulting from the legal or moral obligation on the part of the town where the pauper was settled; to provide for and maintain him. But Mr. J. *Spencer* observed, that whether an *action on the case* could not be maintained by the overseers of S. against the overseers of T., would present a different question; on which, however, he gave no opinion.

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*By the act, (1 N. R. L. 279. 284.) (a) it became the peremptory duty of the town of P., after the adjudication, to support the pauper. Here was a duty imposed by statute, which has been neglected; and the common law gives a remedy by an action on the case. In the case of the *Farmers' Turnpike Company v. Coventry*, (10 Johns. Rep. 339.) it was held, that though a penalty was given by the act for injuring or destroying the toll-gates, yet the plaintiffs had an action of trespass, at common law, for the injury to their property.

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Conckling and Foot, contra. 1. The plea is substantially good. It is admitted that the pauper had no settlement in this state. What ground was there, then, for this action? Even if there was a ground of action, the statute has provided an adequate remedy. We state a fact inconsistent with the averment in the declaration, and then negative that fact with an *absque hoc*.

2. This is a special action on the case for a non-feasance; and the plaintiffs must show the non-performance of some duty imposed on the defendants by law. The defendants were not bound to remove the pauper back to *Plattsburgh*. As to the sum awarded by the Sessions, for costs, prior to the adjudication, the statute provides a remedy. Can they maintain an action for expenses subsequent to the order? The defendants have done no more than their duty. Admitting that the pauper had his settlement in *Pittstown*, the defendants ordered his removal to that town. This was not an illegal act, nor any violation of duty. The duty of the overseers is, to give notice to the justices to inquire, who, thereupon, make the order. If the order was improper, or illegal, it was not the act of the overseers; nor are they responsible for it. If this action can be maintained, it may be brought against the *successors* of the overseers at the time; but that will not be pretended. The case of *Atkins v. Banwell*, (2 East, Rep. 555.) which was cited in the case of *The Overseers of Toga v. The Overseers of Seneca*, is in point, that this action will not lie; and it was a stronger case, for it was brought against the town where the pauper was settled. It is true, that was an action of *assumpsit*; *but the form of the action can make no difference. The principle is the same. The law recognizes no obligation to pay, and of course gives no action. This suit was, probably, brought in consequence of the observation thrown out by Mr. J. Spencer, in the case in 13 Johns. Rep. 383. The 25th section of the act provides a remedy, and there is nothing shown which will entitle the plaintiffs to a remedy at common law.

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Van Vechten, in reply, was stopped by the Court.

(a) 1 R. S. 622.

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Per Curiam. The plea was confessed to be bad; but the defendants insist that the declaration is bad: that, therefore, is the point to be considered.

In the case of *The Overseers of the Poor of Tioga v. The Overseers of Seneca*, (13 Johns. Rep. 380.) we held that *assumpsit* would not lie in a case like the present, on the ground that it did not appear that the pauper was settled in the town from which he was removed. We waived any decision on the question, whether a moral obligation was sufficient to sustain the action, when there was no request to afford maintenance to the pauper. In that case, too, we forebore to express an opinion, whether a special action on the case could not be maintained for the expenses subsequent to the adjudication of the Sessions, provided it should appear that the pauper had no legal settlement within the state. This case presents that question; for, the plea being radically bad, we are referred back to the declaration, and that states the fact, by proper averments, that the pauper had no settlement within the state.

The plaintiffs' case, then, is this; a pauper has been illegally fixed upon them by the agency and instrumentality of the overseers of the poor of *Plattsburgh*; the order removing the pauper to *Pittstown* has been quashed; and the overseers of *Pittstown*, in consequence of the neglect of duty of the overseers of the poor of *Plattsburgh*, in not removing the pauper, or providing for him, have been subjected to heavy expenses in supporting the pauper. Upon full consideration, we are of opinion, that this action is maintainable, on the principle, that a burden has unjustly been thrown upon *Pittstown*, *by the procurement of the overseers of the poor of *Plattsburgh*; that the pauper having no legal settlement in this state, it was their duty to have exonerated *Pittstown* from the burden they had cast on them. Besides, it may be well doubted whether *Pittstown* could make an original order as to this pauper, for his removal to any other town; but, at all events, they were not bound to do so. Whether the plaintiffs can sue, and whether the defendants are liable, in their private capacity, for their own official acts, or the acts of their predecessors, has not been made a question, and the Court, therefore, have not considered the point. The objection will be open to the defendants, if they see fit to make it: at present, we express no opinion upon it.

There must be judgment for the plaintiff on the demurrer.

PLATT, J. I concur in opinion, that the special plea is defective; but cannot agree with my brethren, that the plaintiffs are entitled to judgment; because I think the declaration does not show a right of action.

The declaration states, in substance, the following facts, viz. that on the 1st of August, 1815, *Elijah Briggs* was removed, as a pauper, from *Plattsburgh* to *Pittstown*, on an order of two

justices of *Plattsburgh*, adjudging him to be legally settled in *Pittstown*. In May, 1816, the General Sessions of *Cinton* county, on appeal, quashed the order of removal, and ordered the defendants, then being overseers of the poor of *Plattsburgh*, to pay to the plaintiffs, then overseers of *Pittstown*, 25 dollars, for their expenses and costs.

The declaration further avers, that the pauper had *no legal settlement in this state*; and has continued a charge upon the town of *Pittstown* ever since he was so removed to that town, being sick and unable to bear transportation; that the defendants have continued to be overseers of the poor of *Plattsburgh* ever since the said order of the Sessions; that they had notice, and were requested by the plaintiffs, to provide for the sick pauper; but that the defendants have utterly neglected to provide for the pauper; whereby great charge and expense have fallen upon the plaintiffs, as overseers of the poor of *Pittstown*.

*The suit is not for the 25 dollars awarded by the Sessions, but for neglecting to provide for the sick pauper, from the date of the order of the Sessions till the commencement of this suit.

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Although the order of removal from *Plattsburgh* was erroneous, and has been regularly quashed by the Sessions, yet it is admitted, that the pauper was not legally settled in *Plattsburgh*; for the declaration expressly avers, that "*he had no legal settlement in this state.*"

The moral obligation, in such a case, is upon the overseers of the poor of the town where the sick pauper happens to be. It is the misfortune of *Pittstown* to have such a pauper thrown upon it; but according to the plaintiffs' own showing, it would be an equal hardship upon the town of *Plattsburgh*; he having no settlement in either of those towns.

If it be said, that the pauper was imposed upon the town of *Pittstown*, by a wrongful order of the justices of *Plattsburgh*, I answer, first, that the defendants, as overseers of the poor of *Plattsburgh*, are innocent in regard to that order, and in no wise responsible for the mistake of the justices who made it; and, secondly, that those justices had jurisdiction of the subject, and, for aught alleged, acted honestly in their official order of removal; and, therefore, all ulterior expenses, after the order of Sessions, (reversing the order of the justices,) are *damnum absque injuria*.

In the case of *Crouse v. Mabbitt and Tripp*, (11 *Johns. Rep.* 167.) on *certiorari*, it appeared that *Mabbitt and Tripp*, as overseers of the poor of the town of *Washington*, sued *Crouse*, for "that he, without any lawful authority, brought into the town of *Washington*, one *Wm. Brown*, a pauper, having no settlement there, or within this state; that the pauper fell sick, and was supported by them as overseers, &c., until the death of the pauper and that the defendant well knew all those facts."

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The justice gave judgment in favor of the overseers of the poor ; but this Court reversed the judgment, saying, "There is no principle of the common law on which the action can be maintained."

In the case of *Atkins, &c. v. Barnwell, &c.* (2 East, 504.) *Le Blanc*, justice, said, "There is a moral as well as legal *obligation to maintain the pauper, in his illness, in the parish where he was at the time."

Besides, I am not prepared to admit, that *overseers of the poor*, by our law, have the *capacity of suing or being sued*, in their *official and representative character*, except where they are specially authorized by statute ; as in the three cases expressly provided for, in the 20th, 27th, and 31st sections of the "act for the settlement and relief of the poor." It is an attribute of a corporation, which, I incline to believe, does not belong to the overseers of the poor, upon any principle of the *common law*.

On the latter point, I do not here think it necessary to say more. It was not touched on in the argument ; and although it is fairly presented upon the demurrer, it will still remain open to the counsel for the defendants, if they choose to have it more deliberately examined, upon a motion in arrest of judgment.

Judgment for the plaintiff.

SHERMAN *against* BOYCE.

A deputy sheriff, having a *fi. fa.* in his hands, agrees with the defendant in the execution to delay the sale, and to join with the defendant in

THIS was an action of trespass for taking three horses. The defendant pleaded *not guilty*, with notice of justification under a writ of *fi. facias*. The cause was tried before Mr. J. Yates, at the *Washington* circuit, in *June*, 1817.

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making a note, on which money should be raised, and applied to

It was proved, that the defendant, who was a deputy sheriff, took two of the plaintiff's horses, and sold them, as he alleged, under an execution against the plaintiff ; that he *then offered for sale, and sold the third horse, and directed the purchaser to go to the plaintiff's pasture and take the horse, which the purchaser did. The plaintiff offered to prove, that the defendant, after the execution was returned, and before the sale, made a note, on which money should be raised, and applied to the satisfaction of the judgment, provided that he should still retain the execution in his hands, and if he was called on for payment of the note, might then proceed to sell for his own indemnity. The note is, accordingly, made, the money raised, and paid over to the agent for the creditor's attorney, in satisfaction of the judgment, the officer, at the time, informing the agent that the execution was still to be kept in life for his own indemnity. The officer, being afterwards called upon for payment of the note, sells the defendant's property under the execution. *Held*, that the payment to the judgment creditor, not being a conditional payment, was a satisfaction of the judgment, and, therefore, the execution was spent, and could not be used by the officer to enforce his own agreement with the debtor, such agreement also being illegal, and tending to oppression and abuse ; and that the defendant in the execution might maintain an action of trespass against the officer for the property taken and sold by him. (*a*)

(a) Vide *Millard v. Canfield*, 5 *Wendell's Rep.* 61. *Jackson v. Anderson*, 4 *Ibid.* 474. *Swan v. Smith*, 3 *Ibid.* 676. *Armstrong v. Garroo*, 6 *Cowen*, 465. *Love v. Palmer*, 7 *Johns. Rep.* 159, note (a).

chaser did. The plaintiff, previous to the sale, had forbidden the defendant to sell the horses.

The plaintiff (due notice having been given to the opposite party) introduced parol evidence of a certain receipt, executed by *Daniel Shepherd*, as agent for *Calvin Smith*, attorney for *Jonathan Allen*, the plaintiff in an action against *Christopher Sherman*, (the plaintiff in this suit,) in the *Washington Common Pleas*. *Shepherd* testified, that previous to the sale of the horses, he received, as agent for *C. Smith*, from the defendant in this suit, the amount of the judgment in the case of *Allen* against *Sherman*, and paid the same over to *Allen*; that at the time of giving the receipt, the defendant told the witness, that the money had been borrowed by the plaintiff, on his signing with the plaintiff as security; that he had signed with the plaintiff on condition that he should be allowed to keep the execution in life; and that if he was called on to pay the money, he might then sell under the execution to indemnify himself; that for this reason the defendant would not have the payment endorsed on the execution; and, accordingly, the witness gave him a separate receipt.

The counsel for the defendant objected, that trespass would not lie for the horse which the defendant had not taken into his possession. The judge decided that the action would lie; and the defendant's counsel then offered to prove, that the defendant, as deputy sheriff, had levied, under the *fi. fa.*, in the suit of *Allen*, against the present plaintiff; and after the levy, the plaintiff desired the defendant not to sell, and that he could get the money; that the delay was granted, and that the plaintiff informed the defendant that he could get the money of one *Barney*, if the defendant would sign with him; this the defendant agreed to, on certain terms proposed by the plaintiff; which were, that the execution should still remain in the defendant's hands, as his security, and that if *Barney* should call on him for the money, the defendant might then sell under the execution; that the defendant, accordingly, signed with the plaintiff a note to *Barney*, received the money, and paid it over to *Shepherd*, *at the same time informing *Shepherd*, that the execution was not intended to be discharged, and taking his separate receipt for the money; and that the defendant, before the sale, was called on by *Barney* for payment.

This evidence, being objected to, was overruled, and the defendant's counsel thereupon submitted the following questions to his honor the judge; whether the payment of the money to the judgment creditor precluded the defendant from selling under the *fi. fa.*; and if so, whether the defendant had not, by virtue of the agreement before mentioned, so far possessed himself of the plaintiff's property as to be entitled to dispose of it, in his individual capacity; and whether the plaintiff could deprive him of that right by dissenting at the time of the sale; and whether

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trespass would lie under the circumstances of this case. His honor ruled these points in favor of the plaintiff, and charged the jury accordingly, who found a verdict for the plaintiff; and the defendant tendered a bill of exceptions to the opinion of the judge.

Cowen, for the defendant. The justice of the case is most strongly with the defendant. We are aware of the decision of the Court in *Reed v. Pruyn and Staats*. (7 *Johns. Rep.* 426.) Unless there is an unbending rule of law, which clearly governs the present case, the plaintiff ought not to recover. The case of *Reed v. Pruyn and Staats* came before the Court on a motion to set aside the execution; and the Court laid stress on the fraud and abuse practised. There was no agreement, as in the present case, between the deputy sheriff and the defendant, that the execution should continue in force for the deputy sheriff's security.

Is a deputy absolutely prohibited from making any agreement whatever relative to the execution? If not, then every case must depend on its peculiar circumstances. (*Kenner v. Hord*, 2 *H. and Munford's Rep.* 14.)

Here was a pledge with an incidental power of sale; and that power was irrevocable.

Again; ought not the plaintiff to have applied to the Court, on affidavit, to set aside the execution, instead of bringing an action of trespass? If the Court, on motion, *had set aside the execution, they might have directed the party not to bring an action of trespass.

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Z. R. Shepherd, contra, relied on the case of *Reed v. Pruyn and Staats*, as conclusive, and contended, that such an agreement between the deputy sheriff and the defendant, in the execution, was a breach of duty, and a violation of the statute.

Skinner, in reply, attempted to distinguish this case from that of *Reed v. Pruyn and Staats*, and contended, that even if an action would lie against the defendant, it should be *trover*, not *trespass*, as the property came into his possession rightfully, not tortiously.

PLATT, J., delivered the opinion of the Court.

Although the deputy sheriff declared, when he paid the amount due to the creditor, "that the execution was not intended to be satisfied," that declaration could not affect the right of the creditor to retain the money so paid him, in satisfaction of his claim upon the execution. It was not a conditional payment, nor advance of money by the deputy sheriff to the creditor.

The fair construction of that conversation is, that the deputy

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meant to express his determination not to waive the rights which he had acquired, under the agreement with the plaintiff in this suit, of using the *fi. fa.* for his protection as endorser. The creditor received his money, and gave a receipt for it, to the officer, without any stipulation or condition. The *debt* must, therefore, be deemed *satisfied* as to the judgment creditor; and that fact being established, the law, founded on wise policy, considers the officer as *functus officio*. The *direct* and *sole* object of the *fi. fa.* was to raise the money, to satisfy the judgment creditor: that object being attained, the power conferred by the writ is spent; and the officer is not permitted to use it for enforcing any bargains in which he may think himself aggrieved.

In the case of *Weller v. Weedale* (Noy, 107.) it was decided, that if a sheriff satisfy the debt out of his own money, he cannot afterwards detain the goods of the debtor on *fi. fa.* for his own indemnity. The same doctrine was established in this Court, in *Reed v. Pruyn and Staats*, (7 Johns. Rep. 426.)

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To allow any man to wield the process of our Courts in his own favor, in order to exact such a measure of justice as he may think due to himself, would not only lead to oppression and abuse, but would tend to subvert the foundation of private rights and of civil liberty.

The deputy sheriff, in this case, probably acted from benevolent motives; but the agreement must be pronounced illegal. It was well remarked by Ch. J. Kent, in the case of *Reed v. Pruyn and Staats*, that "*Such humanity is imposing; but it may be turned into cruelty.*"

We are clearly of opinion, that the evidence offered by the defendant was properly excluded, and that an action of *trespass* is a proper remedy in this case.

Judgment for the plaintiff, on the bill of exceptions.

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JACKSON, *ex dem.* YATES and others, *against*
HATHAWAY.

When a highway is laid out over the land of a private person, the public acquires no

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If a person over whose land a highway is laid out, convey the land on each side of it, describing it by such boundaries as do not include the road, or any part of it, the property in the road does not pass to the grantee, as it is excluded by the description in the grant; and it cannot pass as an incident, being in itself a distinct parcel of land; and the fee of one piece of land not mentioned in a deed, cannot pass as appurtenant to another. (b)

When an old road, the fee of which is in one person, is discontinued, and a new road laid out over the land of another person, which land is contiguous to the old road, the proprietor of the land is not entitled to the old road, as a compensation for the land taken for the new road, under the 17th section of the act to regulate highways, (sess. 36. c. 33. 2 N. R. L. 275.) which only applies where another road is substituted over the land of the same proprietor.

(a) Vide *Ontley v. Stanley*, 5 *Wendell's Rep.* 523. In the Matter of *Lewis Street*, 2 *Wendell*, 472. *Noyes v. Chapin*, 6 *Ibid.* 461. *Holladay v. Marsh*, 3 *Ibid.* 142. Matter of *Seventeenth Street*, 1 *Ibid.* 262. *Livingston v. Manor of New-York*, 8 *Wendell's Rep.* 85.

(b) In the matter of extending *Mercer Street*, 4 *Cow. Rep.* 542. *Whitlock v. Cook*, *infra*, 483. *Babcock v. Lamb*, 1 *Cooren*, 238.

THIS was an action of ejectment, brought to recover a lot of land in the city of *Hudson*. The cause was tried before Mr. J. Platt, at the *Columbia* circuit, in *September*, 1817.

By letters patent, dated the 4th of *March*, 1667, a certain parcel of land, including the premises in question, was *granted to *Jan Franse Van Hoesen*. The land came, in the course of descent, to *Johannes Van Hoesen*, who died in 1780, having made a will, one of the devisees under which is *John V. H. Huyck*, one of the lessors of the plaintiffs. It was admitted that the premises in question had always been held under title derived from the original patentee. A witness on the part of the plaintiff testified, that the defendant was in possession of a lot of land of about five acres, in the city of *Hudson*; that the old *Claverack* road runs through the lot, and that the road had been enclosed by the defendant within sixteen years, and since the year 1801. The defendant produced, in evidence, deeds for the land lying on each side of the old *Claverack* road; and it was admitted that, with the exception of the road, the defendant had, under these deeds, a good title to all the land in his possession. One of the deeds was from *J. V. H. Huyck*, dated 25th of *July*, 1798.

By an order of the common council of the city of *Hudson*, dated the 23d of *April*, 1801, it was resolved, that a certain street should be laid out, provided that the defendant *Hathaway* should cede to the corporation all the lands which should be taken from him, by laying out the street, in which case the common council would cede to him, in exchange therefor, the old road before mentioned.

A verdict was taken for the plaintiff, subject to the opinion of the Court, whether the plaintiff was entitled to recover the old road

Cantine, for the plaintiff. The freehold, or fee, of a highway, belongs to the original owner of the soil, and he may maintain trespass or ejectment for it. The public have only the right of passage, or use of the land for a highway, which is an *easement* or *servitude*. (*Cortelyou v. Van Brundt*, 2 *Johns. Rep.* 357. 363.

Lade v. Shepherd, 2 Str. 1004. *Mayor of Northampton v. Ward*, 1 Wils. 107. 2 Str. 1253. S. C. 1 Roll. Abr. 312. *Chimin Private*, (B.) 6. l. 2, 3, 4, 5. 8 E. IV. 9. 2 E. IV. 9. 3 H. VII. 5, 6. *Brook's Abr. Chimin*, 9, 10. 1 Burr. 143. *Brook's Abr. Nuisance*, pl. 28. 3 H. VII. 5. 3 *Comyn's Dig.* 27, 28. *Chimin*, (A. 2.) 3 *Bac. Abr.* 494. *Highways* (B.) 4 *Vin. Abr.* 515. *Chimin private* (B.) *Fitzherb. Abr. Chimin*, pl. 1. *Fitzh. Trespass*. pl. 95. 2 *Inst.* 705. *Wood's Inst.* 28.) In the case of *Perley v. Chandler*, before the Supreme Court of Massachusetts, the same doctrine was expressly laid down by Ch. J. Parsons, who delivered the opinion of the Court. (6 *Mass. Rep.* 454.)

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Again; a grant of land to a road, does not include the half or any part of the road. The rule as to rivers does not apply.

E. Williams, contra. The Court will not be disposed, in this case, to intend any thing in favor of the plaintiff, unless compelled by some stubborn and inflexible rule of law. By the 4th section of the act to regulate highways, (2 N. R. L. 234.) *Hudson* is declared to be a town for all purposes intended by the act, except that the mayor, aldermen, and commonalty of the city, are commissioners of highways. The common council being, *ex officio*, commissioners of highways, had power to shut up the old road. By the 17th section of the same act, (2 N. R. L. 275.) (c) it is enacted, "that where any road shall run through the lands of any person, or along the boundaries thereof, in whole or in part, and the same shall become unnecessary, or be discontinued, by reason of some other road to be established and laid out, by virtue of this act, through the lands of the same person, the jurors or commissioners making the assessment shall take into calculation the value of such road, so discontinued, or become unnecessary, and the benefit resulting to such person by reason of such discontinuance, and make deduction from the amount of such assessment, accordingly; and the balance, and no more, shall be the sum to be assessed and paid, for the opening and laying out such new road: and thereupon it shall be lawful for the owner of the land to enclose so much of the road, so discontinued, or become unnecessary, as shall run through his land along the boundaries thereof." This act gives to the person ceding a new road a right to shut up or enclose and enjoy the old road through or along his land. If an actual conveyance, or deed of cession, to the common council, from the defendant, was necessary, the Court, after this lapse of time, will intend that there was such a conveyance. But we contend that it was not necessary. The law will imply the cession.

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The owners of land bounded on roads, rivers, and creeks, are bounded on *tines*, and own to the middle of the line, or road,

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or creek. In *Jackson, ex dem. the trustees of Kingston, v. Lowe* (12 *Johns. Rep.* 252.) one of the boundaries in the plaintiff's deed was "to a white oak tree marked, standing near the said *kill*, then up the said *kill* north," &c. Mr. J. Yates, in delivering the opinion of the Court, says, "This description or boundary never can be satisfied by running a direct or straight line; the terms *up the same* necessarily imply, that it is to follow the creek, according to its windings and turnings, and that must be in the middle or centre of it. The rule is well settled, that when a creek not navigable, and which is beyond the ebb and flow of the tide, forms a boundary, the line must be so run. The Court looked to the intention of the grantor.

The deed from *H.* to the defendant conveys all right, title, &c., reversion and reversions, remainder and remainders, and with the hereditaments and appurtenances, &c., to the premises belonging or appertaining. This is sufficient to comprehend the old road, in case a new one should be opened, and the old one be discontinued. Many things pass by a deed, not specified in it, but which are necessary to the perfect enjoyment of the premises granted. It can never be supposed that the grantor meant to reserve a right to this old road. The law will intend that it was included in the grant of the land through which it runs. The lessors entered under the devisees of the patentee, and when they sold the farm, the right to the road also passed. In the ever-varying circumstances of this country, how many old roads have fallen into neglect and disuse, as new and better roads have been opened! What a floodgate of litigation will be opened, should it be decided that these old roads do not belong to the owners of the adjoining lands! New cities and towns are every day rising, and populous streets cover the ancient roads and ways laid out on the first location of patents. In the case cited from *Massachusetts*, Ch. J. *Parsons* observed, that there was a defect in the case, that it was not alleged, that *C.* was seized of the land covered by the highway; nor that the water-course was sunk in this land; nor that the way had been previously laid out. Besides, there is no such statute in *Massachusetts*, as that of this state, relative to highways.

Oakley, in reply, contended, that the description and boundaries in the defendant's deed, did, in their very terms, exclude the road. Can the defendant, by implication, or by the construction of the statute, acquire a title to land which is, confessedly, in the lessor of the plaintiff, or the persons under whom he claims? If the act does bear such a construction; if it takes the land of the lessor, and gives it to *H.* without his consent, or a just compensation for it,—then the statute is, so far, unconstitutional and void. But the act admits of a just and reasonable interpretation, without involving such a consequence

It applies to those cases only where the owners of the land adjoining the highway are, also, owners of the land over which the road passes. It could never have been intended by the legislature, that when the fee of the road was in one person, he should be divested of it, and the property transferred to another, by the mere operation of the act. Suppose a conveyance of land made since the passing of that act, in which a road running through the land conveyed is excepted, in express terms, and that road is afterwards discontinued and shut up, would the old road then pass to the owners of the adjoining lands by virtue of the statute? The terms *running along* the road, do not mean that the road runs *through* the land. Where land is conveyed with covenants for quiet enjoyment, against encroachments, &c., the existence of a road, or right of way over it, would be a breach of the covenant. Thus, if the deed bounds the premises *by, or along, a road*, it would, according to the argument of the defendant's counsel, include the road, the existence of which would be a breach of the covenant.

The case of *The Trustees of Kingston v. Lowe* is very different from the present. Cannot a deed contain words which will exclude a *creek* at which the boundaries begin? No words of exclusion can be stronger than those in the defendant's deed. The subject of the conveyance is the land within the precise metes and bounds given, and nothing else. The law may, in a supposed case, give a right of way as appurtenant to the land granted, because essential to its enjoyment; but it does not give the *land* over which the right of way passes, as an appurtenant. The usual sweeping clause in the deed, of all right, title, interest, reversion, &c., though they may include *easements* or privileges, as appurtenant, do not convey any other *land* than what is before particularly described.

The novelty of the case, or its consequences, as they may affect others, can furnish no argument against the plaintiff's right to recover, if he has shown a legal title to the land for which the suit is brought.

PLATT, J., delivered the opinion of the Court. This is an action of ejectment for a piece of land in the city of *Hudson*, over which the ancient road from *Claverack* to *Hudson* river formerly run.

The plaintiff showed a title in his lessor, *John V. H. Huyck*, to an undivided share of the premises in question, under the patent to his ancestor *Jan Francis Van Hoesen*, dated the 6th of *August*, 1721. The defendant then proved a deed of conveyance from *John V. H. Huyck* to *Ephraim Whitaker*, dated 25th of *July*, 1793, for "a certain tract of land beginning at a certain stake by the side of the road called the old *Claverack* road, &c., from which stake running east 20°. south, 2 chains, to another stake; thence south, 22°. west, 17 chains 64 links;

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and thence," by specified courses and distances, "to the first-mentioned bounds, making 12 acres, 2 roods and 10 perches of land." It was also proved, that the defendant had acquired a title, by purchase, to another tract of land, which, according to specified courses and distances, is bounded on the northern side of the said road.

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It appears that, about 16 years ago, by an order of the common council of the city of *Hudson*, the "old Claverack road" was discontinued as a public highway; and that the defendant then enclosed a lot of about five acres, so as to include the whole width of the old road, together with a part of each of the several tracts before described; the one lying on the north, and the other on the south side of said road. The plaintiff admits the defendant's title to all the land contained in the five acre lot, excepting the space formerly occupied as the old road.

It is perfectly clear, that the fee of the land was not divested from the patentee, or his heirs, by the act of the government, in laying out and opening the road. Highways are regarded in our law as *easements*. The public acquire no more than the right of way, with the powers and privileges incident to that right; such as digging the soil and using the timber and other materials found within the space of the road, in a reasonable manner, for the purpose of making and repairing the road and its bridges. When the sovereign imposes a public right of way upon the land of an individual, the title of the former owner is not extinguished; but is so qualified, that it can only be enjoyed, subject to that easement. The former proprietor still retains his exclusive right, in all mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the public right of way. The person in whom the fee of the road is, may maintain trespass, or ejectment, or waste. (*Burr.* 143. 2 *Stra.* 1004. 1 *Wil.* 107. 6 *East*, 154. 2 *Johns. Rep.* 363. 6 *Mass. Rep.* 454.) But when the sovereign chooses to discontinue or abandon the right of way, the entire and exclusive enjoyment reverts to the proprietor of the soil.

In this case, there is nothing, in the deeds for the lots bounded on the sides of the old road, which denotes any intention to buy or sell any land not expressly included within the courses and distances expressly defined; and it is conceded, that those limits do not include the space occupied by the old road. A contingency has happened, which, probably, was not thought of by the grantor or grantee in those deeds; that is, the discontinuance of the road. The grantee, however, has all the land included in the terms of his purchase; but he has lost, by the act of the government, the privilege of a highway adjoining his lots, and running between them. The laying out of roads, and their discontinuance, are contingencies to which every man's land is liable, and by which its value may be es-

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essentially affected; and every sale of land, by definite boundaries, is subject to those casualties.

In the present case, I can perceive no principle of law to defeat the plaintiff's claim to the land over which the old road passed. The government laid a *quasi* encumbrance on his land, and the government has since removed that encumbrance. Even while the road continued, the owner of the soil might have maintained an action of ejectment for an exclusive appropriation of it; *a fortiori*, he can do so, after the public right of way is abandoned; unless by his own act he has become divested of his title. The only acts imputed to the plaintiff, or those under whom he claims, are the two deeds for the parcels of land bounded on the *north side*, and on the *south side* of the old road. The boundaries in those deeds do not include the space of the road; and, of course, the plaintiff's title to the intervening ground remains as perfect as if no road had ever been there. The purchasers under those deeds have lost an easement which was *public*, not *private*; but they have, exclusive of the old road, all the land which they bargained for.

There are many cases of *loose, vague, and general description* in deeds, which, undoubtedly, may require a different construction, and be subject to a different rule. Where a farm is bounded *along a highway, or upon a highway, or running to a highway*, there is reason to intend that the parties meant the middle of the highway; but in this case the terms of description necessarily exclude the highway. The owner of the soil encumbered with a road, has a perfect right to sell it, subject to that encumbrance; and whoever buys land, without securing the fee of the adjoining roads, incurs the risk of such omission. That the original owner has also a right to retain his estate in the road, when he sells the adjacent lands, is a proposition too plain to be denied.

It is impossible to protect the defendant, on the ground that the adjoining road passed by the deeds, as an *incident* to the lands professedly granted: A mere *easement* may, without express words, pass as an incident to the principal object of the grant; but it would be absurd to allow the fee of one piece of land, *not mentioned in the deed*, to pass as **appurtenant* to another distinct parcel, which is expressly granted, by precise and definite boundaries. The defendant can derive no aid from the 17th section of the "act to regulate highways." (2 N. R. L. 275.) (n) The sole object of that provision was to establish a rule of compensation, where an old road is discontinued, and a new one substituted, over the land of the same proprietor; and it would be highly disrespectful to suppose, that the legislature meant to take away the land of one man, and give it to another. Such an act would be an outrage

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against justice and the constitution. Still less reason is there for admitting the principle, that the common council of *Hudson* could, by any act, divest the plaintiff of the fee of the old road, without his consent.

We are, therefore, of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff. (α)

(α) Vide *Peck v. Smith*, (*Day's Connec. Rep.* 103—147. November, 1814,) in which the subject is fully discussed and considered by the judges of the Supreme Court of Errors of *Connecticut*. *W.* conveyed to the plaintiff a piece of land, with the usual covenants of seisin and warranty, "saving and excepting the road or highway, laid out, used and improved, running from the old highway to the bridge over the premises." It was held, that the right of soil in the highway was vested in the plaintiff, subject to the right of passage in the public, and that he could maintain trespass *quare clausum fregit* against the defendant for erecting a shop on a part of the highway not used for travelling before the conveyance to the plaintiff.

KELLOGG AND REED *against* WILDER.

A justice of the peace has no right, during a trial before him, to permit the parties to treat the jury with spirituous liquor. (b)

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IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action of trespass, in the Court below, against the plaintiffs in error, for taking his cow. The facts proved at the trial are altogether unimportant; it is sufficient to state, that the plaintiff below showed a bare possession, without any property in the cow; and that the defendant, *Kellogg*, proved a property in himself, *the other defendant acting as his assistant in driving away the cow.

After the evidence on the trial in the Court below had closed, each of the parties, by permission of the justice, treated the jury with a bottle of whisky. in order, as the return states, "to enable them to listen to the remarks of counsel." A verdict and judgment were rendered for the plaintiff below.

Per Curiam. Independent of the gross misconduct of the justice, in permitting such an improper use of spirituous liquor at the trial, for which the consent of parties affords no excuse, the verdict was decidedly wrong upon the evidence.

Judgment reversed.

(b) The circulation of spirituous liquors among a jury, while sitting as such, even with consent of parties, is cause for reversing the judgment. *Rose v. Smith and Davis*, 4 *Conn. Rep.* 17. *Ante*, 87. Vide *Dennison v. Collins*, 1 *Id.* 111.

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IN ERROR to the Court of Common Pleas of the county of *Franklin*.

This was an action of trespass on the case, brought in the Court below, by the plaintiff in error, against the defendant in error, who was sheriff of the county of *Franklin*, for not executing or returning a writ of *fiery facias*. The declaration stated, that in the term of *October*, 1815, of the Court below, the plaintiff obtained a judgment against one *Whipple*, for 55 dollars and 25 cents; that on the tenth of *December*, in the same year, he issued a *fi. fa.* to the defendant, returnable on the 28th of *January* then next, which was delivered to the defendant to be executed; and although there were goods and chattels, and lands and tenements, on which the defendant might have levied, yet he did not levy, nor did he ever return the writ.

The defendant pleaded that before the commencement of this suit, he was not required by any rule of the said Court of Common Pleas, to return the writ, before the judges and assistant justices thereof, according to the course and practice of the said Court.

To this plea there was a general demurrer: the defendant joined in demurrer, and the Court below gave judgment for the defendant. The cause was submitted without argument.

THOMPSON, Ch. J., delivered the opinion of the Court. This case comes before the Court on a writ of error to the Common Pleas of *Franklin* county. It was a special action on the case, against the defendant, as sheriff, for neglecting to levy and collect the amount of a certain *fiery facias*, issued out of the said Court of Common Pleas, in favor of the plaintiff, against *Nathaniel Whipple*, according to the directions and exigency of the writ. The only plea interposed by the defendant was, that he had not been required, by any rule of Court, to return the said writ, according to the course and practice of the Court. To this plea there was a general demurrer, upon which the Court gave judgment for the defendant.

The judgment was erroneous. There can be no doubt that an action will lie against a sheriff, for neglect of duty, in not returning an execution delivered to him. The declaration in the Court below set forth, with all necessary certainty, the judgment and execution; the delivery of the same to the sheriff, before the return day; and that the defendant in the execution had sufficient goods and chattels, lands and tenements, within the county, whereof the money, required by the execution to be raised, might have been levied and collected, but which the de-

An action on the case will lie against a sheriff for not returning an execution, or the party may proceed by attachment, at his election. (a).

In an action on the case against a sheriff for not levying and returning a writ of *fiery facias*, a plea that the sheriff had never been ruled to return the writ is bad, for the sheriff is bound to return a writ without

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(a) Vide *The People v. Spraker*, 18 Johns. Rep. 390.

(b) *Dygart ad. Crane*, 1 Wendell's Rep. 534.

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defendant neglected and refused to do. It is no answer for the sheriff to allege that he had not been ruled to return the execution. This he was bound to do, without being ruled. The plaintiff had his election to proceed either way; and the sheriff cannot avail himself of his own neglect of duty to defeat the plaintiff's action. This is a principle fully recognized by this Court in *Hinman v. Breese*, (13 Johns. Rep. 529.) Our statute concerning sheriffs recognizes such an action against the officer. It declares, that if any sheriff, or other officer, shall not make due return to any writ delivered to him to be executed, he shall not only be liable to attachment, or amercement, but, also, to an action on the case, for damages, at the suit of the party aggrieved. (1 N. R. L. 423.) The judgment of the Court below must be reversed.

Judgment reversed.

POLLY STOW, Widow of TIMOTHY STOW, against TIFFT.

Where the seisin of the husband is instantaneous, or passes from him *eo instanti* that he acquired it, his widow is not entitled to dower.

So, where land is conveyed to the husband during coverture, who, at the same time, executes a mortgage to the grantor, to secure the consideration money, the seisin of the land is but for an instant in the grantee, and is immediately re-vested in the grantor, and, consequently, the widow of the grantee cannot claim her dower in the premises.

THIS was an action of dower, brought to recover dower in two lots in *Douglas* patent, in the town of *Bolton*, in the county of *Warren*. The tenant pleaded *ne unques seise que dower*, and *ne unques accouple in loyal matrimonio*. The cause was tried before Mr. J. Yates, at the *Warren* circuit, in June, 1817.

The marriage of the demandant, and the death of her husband, in December, 1804, were proved. Timothy Stow, the husband of the demandant, purchased the premises in question during the coverture, and paid part of the consideration money; and, to secure the payment of the residue, executed, at the time of receiving the conveyance, a mortgage of the same premises to the grantor: after his death, the land was sold under a power contained in the mortgage, and was purchased by a person from whom the tenant derived his title.

A verdict was found for the demandant, subject to the opinion of the Court, on a case containing the above facts.

Weston, for the plaintiff, contended, that the demandant was entitled to her dower, notwithstanding the mortgage by her husband, and the sale under it. The act (sess. 10. ch. 4. s. 1. N.

Where two instruments relating to the same subject are executed at the same time, they are to be taken in connection, as forming parts of the same agreement; as where a conveyance of land, and a deed to secure the purchase money, are executed at the same time; the effect of which transaction is, that if the price of the land shall not be paid at the stipulated time, the grantor shall be re-vested of the land, free of the mortgage; and whether such an agreement be contained in one and the same instrument, as it well may be, or in distinct instruments, can make no difference as to the effect. (a)

(a) Vide *Jackson v. McKenny*, 3 Wendell's Rep. 223. *1st Page v. McKenna*, 1 *Ibid.* 164. *Jackson v. Dewitt*, 6 Cow. Rep. 316. *Wilson v. Troup*, 2 Cow. Rep. 218. *Jackson v. Austin*, 15 Johns. Rep. 471.

R. L. 55.) (a) says, that the widow shall have assigned *to her, for her dower, the third part of the lands of her husband which were his at any time during the coverture. If the land abides in the husband for the interval of but a single moment, the wife will be entitled to her dower. (2 *B! Comm.* 132.) The husband, in this case, purchased the land, and paid part of the consideration money, and received an absolute conveyance in fee; and to secure the remainder of the purchase money, he mortgaged the same land, on the same day, to the grantor. There was a moment of time in which the land was in him, though he immediately after conveyed it to the mortgagee. It was a seisin, though for an instant, *beneficially for his own use.* (2 *Bac. Abr.* 371. *Guillim's* ed. *Dower C. 2. in notes.* *Preston on Estates*, tit. *Dower.*) The defendant cannot object to the seisin of the husband, the mortgagor, as he claims title under him. (*Taylor's case*, cited in *Sir Wm. Jones*, 317. 2 *Bac. Abr.* 371. note.)

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Cowen, contra. This very question was raised in the case of *Hitchcock v. Harrington*; (6 *Johns. Rep.* 290.) but the Court did not think it necessary to discuss or decide it. Dower is a legal claim or title, and can exist only where there is a legal seisin or estate. The seisin of the husband, in this case, being instantaneous, no right of dower vested in the wife. *Coke* says, a wife shall not be endowed of a seisin for an instant. (*Co. Litt.* 31. b.) As if a tenant for life makes a feoffment in fee and dies, the wife shall not be endowed. (*Id.* note 3.) So, in *Ancotts v. Catherick*, (*Cro. James*, 615.) where a husband, seised jointly with his wife in special tail, makes a feoffment after her death, to himself for life, remainder to his son in tail, but before livery to these uses, marries a second wife, and *after livery* dies, the second wife was held not to be entitled to dower; for the husband gained no new estate, it being *eo instanti* drawn out of him. The same principle is recognized in *Lord Cromwell's case*; (2 *Co.* 77.) there *B.* covenanted to suffer a recovery and levy a fine to the use of *A.*, and a fine was levied to *R. Perkins*, and his heirs, who granted and rendered a rent, &c. to *B.* in tail, with remainder in fee, &c., and granted and rendered to *A.*, in fee, with proclamations, &c.: it was held *that the seisin of *Perkins* being but for an instant, and only to the purpose to make the render, his wife should not be endowed, nor the land subject to his recognizances or statutes. The same point was adjudged in *Dixon v. Harrison*. (*Vaughan*, 41.) *Blackstone*, also, lays down the same doctrine. The seisin of the husband, for a transitory instant only, when the same act which gives him the estate, conveys it, also, out of him again; as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine, such a seisin will not entitle the wife to

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dower. (2 *Bl. Com.* 131.) It is like a feoffment and defeasance, at common law, which is deemed but one conveyance. (2 *Bl. Com.* 327. *Co. Litt.* 236. b.) A wife could not be endowed of an use at common law; nor can the wife of a *cestuy que trust* be endowed. (*Clairborne v. Henderson*, 3 *Hen. & Mun. Rep.* 323. 2 *Bac. Abr.* 361. *Gwillim's ed. Dower. B. 2. 3. P. Wms.* 339.)

By the act relative to mortgages, passed the 9th of April, 1805, which is a declaratory act, whenever lands are sold and conveyed, and a mortgage is given by the purchaser at the same time, to secure the purchase money, such mortgage is preferred to any previous judgment which may have been obtained against such purchaser. This shows that the legislature considered such to be the rule of the common law, though some doubts had been raised concerning it, which the statute intended to remove. The act confirms and supports the principle laid down in the cases already cited, that the *seisin being instantaneous* in the husband, it is not subject to dower, or judgments and recognizances.

This very question came before the Supreme Court of *Massachusetts*, in the case of *Holbrook v. Finney*, (4 *Mass. Rep.* 566.) in which the late Ch. J. *Parsons* delivered the opinion of the Court, that the deed and the mortgage back to secure the purchase money, were to be considered as parts of one and the same contract, and as taking effect at the same instant, and, therefore, the wife of the mortgagor could not be endowed.

Weston, in reply, said, that the cases cited from the *English* books were those in which the husband takes the estate for some particular purpose or use, *not for his own benefit*; *but is the mere instrument of passing the estate. The case in *Wales*, mentioned in *Cro. Eliz.* 503, supports this distinction. There the father and son were joint tenants to them and the heirs of the son, and they were both hanged in one cart; but because the son died last, his wife was held entitled to dower. The seisin, though instantaneous, was for the benefit of the survivor. So, where lands descend to a man who is married, and a stranger enters immediately on the death of the ancestor, so that the seisin is but for an instant, being devested by the *abatement*, yet the wife of the heir will be endowed. In the case of *Nash v. Preston*, (*Cro. Car.* 190.) *J. S.*, seised in fee, bargained and sold to the husband, for 120 pounds, in consideration that he should redemise it to *J. S.* and wife, for their lives, rendering a peppercorn, and with condition, that if he paid back the 120 pounds, at the end of 20 years, the bargain and sale should be void. The bargainee redemised accordingly, and died; and it was held, that his wife was entitled to her dower. It was likened to a mortgage; and it was said that if the wife be dowerable by act and rule of law, a Court of equity could not deprive her of her right.

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Again; our Courts consider a mortgage merely as a security for the debt. The mortgagor, notwithstanding the mortgage, is deemed *seised*, and is the legal owner of the land. (*Hitchcock v. Harrington*, 6 Johns. Rep. 290.) The wife of the mortgagor may be endowed out of the lands mortgaged. (*Collins v. Tory*, 7 Johns. Rep. 278.) (a) The equity of redemption of a mortgagor may be sold on execution; (*Waters v. Stewart*, 1 *Caines's Cas. in Error*, 47.) but lands mortgaged cannot be sold under an execution against the mortgagee, before a foreclosure, though the estate of the mortgagee has become absolute at law. (*Jackson, ex dem. Norton, v. Willard*, 4 Johns. Rep. 41.) Our Courts have, in this respect, gone further than the Courts in England.

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SPENCER, J., delivered the opinion of the Court. The demandant's right to recover her dower depends on the nature of her husband's seisin. *Timothy Stow*, her husband, purchased the premises in question after his marriage with the plaintiff, and paid part of the consideration money; and *for securing the residue, he, at the time of receiving his conveyance, executed to the grantor a mortgage of the same premises. After his death, the premises were sold under a power contained in the mortgage, and the defendant holds under that sale. The question to be decided is, whether there was such a seisin of the husband of the demandant, as to entitle her to dower. This depends on the single point, whether the seisin of the husband was an instantaneous seisin or not. If it was an instantaneous seisin, then, according to all the authorities, the wife is not endowable. This general position is met with in all our books, that the husband's seisin for an instant, does not entitle the wife to dower. This is exemplified by the case of *Amcotts v. Catherick*. (*Cro. Jac.* 615.) There the husband, who was seised in special tail, made a deed of feoffment to the use of himself for life, and, after, to the use of his son in tail, and made a letter of attorney to make livery. Before livery, he took the demandant to wife, and after livery was made to those uses, the husband died, and the question was, whether the wife was entitled to dower; and it was adjudged that she was not, for that the livery did not gain to the husband any new estate, but being, *eadem instanti*, drawn out of him, he gained no seisin whereof his wife was dowable; for that having no estate before the feoffment, whereof the wife was dowable, he gained none by the feoffment of which his wife could be endowed. Three cases were there put, in which the wife would not be entitled to dower, as where a tenant for life, or a joint tenant, makes a feoffment; so where a married man took a fine, and by the same fine rendered the land to another in tail, his wife shall not be endowed thereof; because, although he took it in fee, yet it is instantly out of

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(a) Vide *Taber's v. Taber*, 1 Johns. Ch. Rep. 45

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him; so if a feoffment be made to one and his heirs, to the use of another and his heirs, the wife of the trustee shall not be endowed, for he was the mere instrument, and had but an instantaneous seisin. (1 Co. 77.)

The case of *Nash v. Preston* (Cro. Car. 180.) would seem, at first view, to be opposed to the proposition, that a deed to the purchaser, and a mortgage given back by him to the grantor, at the same time, would not entitle the wife of the purchaser to her dower; yet it is observable, that the principle is admitted, that an instantaneous seisin of the husband *does not entitle the wife to dower. *Croke* admits, that if a husband take a fine *sur cognisance de droit come ceo*, and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him, *quasi uno flatu*, and by one and the same act. That case does not state that the redemise was made at the same time with the bargain and sale; and I presume it was not. That case, therefore, does not bear on the general principle.

I am authorized to say, by the decision of this Court in *Jackson v. Dunsburgh*, (1 Johns. Cas. 95.) that where two instruments are executed at the same time, between the same parties, relative to the same subject matter, they are to be taken in connection, as forming together the several parts of one agreement. I entirely agree in the opinion expressed by Ch. J. *Parsons*, in the case of *Holbrook v. Finney*, (4 Mass. Rep. 569.) that where a deed is given by the vendor of an estate, who takes back a mortgage to secure the purchase money, at the same time that he executes the deed, that there the deed and the mortgage are to be considered as parts of the same contract, as taking effect at the same instant, and as constituting but one act; in the same manner as a deed of defeasance forms, with the principal deed, to which it refers, but one contract, although it be by a distinct and separate instrument.

The substance of a conveyance, where land is mortgaged at the same time the deed is given, is this:—The bargainor sells the land to the bargainee on condition that he pays the price at the stipulated time, and if he does not, that the bargainor shall be resealed of it, free of the mortgage; and whether this contract is contained in one and the same instrument, as it well may be, or in distinct instruments executed at the same instant, can make no possible difference. It is true that Courts of equity have interposed to relieve the mortgagor against the accident of his non-payment of the price, at the stipulated period. It is also true, that Courts of law have considered the interest of the mortgagor as liable to be sold on execution. This, however, does not interfere with the question, as to how the contract between the original parties is to be viewed, as between themselves, when the equity of redemption is gone and forfeited.

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The opinion which the Court has formed receives decisive *support from the declaratory act of the 28th sess. ch. 99. It recites that whereas doubts have arisen whether mortgages given

to secure the purchase money of land sold and conveyed, at the time of the execution of such mortgages, are to be preferred to judgments previously obtained against the mortgagors, for the removal whereof, it is enacted and declared, that whenever lands are sold and conveyed, and a mortgage is given by the purchaser at the same time, to secure the payment of the purchase money, such mortgage shall be preferred to any previous judgment which may have been obtained against such purchaser.

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This statute conveys the sense of the legislature, that the seisin of the mortgagor, under the circumstances stated in the act, was a seisin for an instant only; for it cannot be doubted, that a judgment will attach on lands, of which the judgment debtor becomes seised at any time posterior to the judgment; and nothing could prevent a judgment creating a lien on the subsequently-acquired lands of the judgment debtor, but the circumstance that his seisin, in the given case, was instantaneous. Surely, then, the analogous case of *dower* cannot stand on a better footing than a judgment unsatisfied. As a declaratory act, this statute is entitled to high respect; and it fortifies and supports the position, that the demandant's husband acquired, by the deed to him, a seisin, which he parted with *eo instanti* he acquired it, and that his wife is not endowable of the premises. The Court are very well satisfied, that the law is so, for it would be extremely inequitable, in most cases, to claim dower on such purchases. We are, therefore, of opinion, that there must be judgment for the defendant.

THOMPSON, Ch. J., *dissented*. The demandant, as the widow of *Timothy Stow*, deceased, claims her dower in lands purchased by her late husband after their intermarriage. He paid part of the consideration money, and for securing the residue, mortgaged the lands. After his death, the mortgaged premises were sold, pursuant to the statute, and purchased by the person under whom the defendant claims; and the only question is, whether the husband was so seised as to entitle his wife to dower.

*In the case of *Hitchcock v. Harrington*, (6 *Johns. Rep.* 219.) this point was stated, but not decided by the Court. It has long been considered the settled law in this state, that a mortgage is a mere security for money, and the mortgagor is to be deemed seised, notwithstanding the mortgage, as to all persons, except the mortgagee and his representatives. The seisin of the husband, in this case, cannot be considered that mere *instantaneous seisin*, which the books speak of as not being sufficient to entitle the wife to dower. Those are cases where the husband is a mere conduit pipe, or instrument of conveyance. This is evidently the meaning of Lord *Coke*, where the rule is laid down. (*Co. Lit.* 31. b.) It is more fully illustrated by Sir *Wm. Blackstone*, in his *Commentaries*, (vol. 2. 131.) where it is said, that the seisin of the husband, for a transitory instant only, when the same act which gives him the estate, conveys it,

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also, out of him; as where, by a *fine*, land is granted to a man, and he immediately renders it back by the same fine, such a seisin will not entitle his wife to dower; for the land was merely *in transitu*, and never rested in the husband, his grant and render being one continued act. But if the land abides in him, for the interval of but a single moment, the wife shall be endowed thereof.

Where a title is conveyed to a person, and he gives back the mortgage, the fee is certainly vested in him, *substantially* and *beneficially*, and not nominally; otherwise, the mortgage back would convey no title. The case of *Nash v. Preston* (Cro. Car. 190.) is very much in point, to show that the widow is entitled to her dower. There was a bargain and sale of land to the husband, under an agreement that the bargainee was to redemise it to the bargainor and his wife, during their lives. The bargainee redemised and died, and his widow was considered entitled to dower. For, say the Court, by the bargain and sale, the land is vested in the husband, and thereby the wife is entitled to her dower. This question of instantaneous seisin is well considered by *Gwillim*, in a note to the late edition of *Bacon*. (2 *Bac. Ab.* 371. note.) It is there said, that the proposition, that in the case of an *instantaneous seisin*, the wife shall not be endowed, though laid down broadly by *Coke*, is by no means general: he confines it to cases where the husband is a mere *instrument of passing the estate*. The transitory seisin gained by such an instrumentality is not enough to entitle the wife to dower; but when the land abides in the husband, for a single moment, as is said by Sir *Wm. Blackstone*, or, as a later writer explains it, (*Preston on Estates*, tit. *Dower*.) when he has a seisin for an instant, *beneficially for his own use*, the title to dower shall arise in favor of his wife. The case of *Holbrook v. Finney* (4 *Mass. Rep.* 566.) has been cited, and relied upon, as in point against the claim of dower. Whatever respect may be due to the opinion of Ch. J. *Parsons*, he certainly stands unsupported by any adjudged cases to be found in the *English* books, or by any elementary writer, when fairly explained. In none of the cases referred to by him, in his opinion, was the husband ever *beneficially* seised, for an instant; and the distinction which he attempts to make between the case of *Nash* and *Preston*, and the one before him, is certainly not well founded. In the case of *Nash* and *Preston*, the redemising was a part of the original agreement; yet the wife of the bargainee was held entitled to dower. So, in *Holbrook* and *Finney*, the deed and mortgage were executed in pursuance of a previous agreement to the same effect, made between the parties. The two cases, therefore, in this respect, are alike. Ch. J. *Parsons* seems fully to admit the law as laid down in *Nash* and *Preston*; and it is a little difficult to understand what he means, by saying that the giving the deed, and taking the mortgage back, constitute but one act, unless the two deeds, being parts of the same contract, are but one act. But whatever importance may be attached to this

circumstance, the argument cannot be applied to the case before us, because it formed no part of the original agreement, that a mortgage was to be given back.

I do not see how our statute, to prevent judgments having a preference to mortgages given to secure the purchase money, can in any manner affect this question. It is true, that the first act (sess. 28. ch. 99.) contained a recital, purporting that doubts had arisen, whether mortgages given to secure the purchase money of lands sold and conveyed at the time of the execution of such mortgages, are to be preferred to judgments previously obtained against the mortgagors, and then provides for giving a preference to mortgages thus taken. But this act has no relation to mortgages, in any other respect than to give them a preference to judgments in that particular case. And it is to be observed, that the right to sell land under a judgment, the *lien* created by such judgment, and the time such lien is to take effect, are all matters of statute regulation. This act only modifies the former statute, and suspends the *lien* of judgments in such particular cases. But the right to dower depends on different principles. It would, no doubt, be competent to the legislature, to take away or regulate the claim to dower, in cases like the present; but until that is done, we must be governed by the common law rules on this subject; according to which I see no grounds upon which the claim to dower in this case can be resisted. I am, accordingly, of opinion, that the demandant is entitled to judgment.

Sed per Curiam.

Judgment for the defendant.

THE PRESIDENT, &c. of the MECHANICS' AND FARMERS' BANK, in the City of ALBANY, against CAPRON.

THIS was an action of *assumpsit* on a promissory note drawn by J. J. Lansing & H. Lansing, dated the 27th of October, 1813, for 400 dollars, with interest, payable to the defendant, four years after date, and endorsed by him. The cause was tried at the Albany circuit, in April, 1818.

*The signature of the makers and endorser, demand of payment, and notice to the endorser, and protest for non-payment on the 30th of October, 1817, were proved. The defendant

endorsement not creating a certain debt, but merely a liability contingent on the non-payment of the note by the maker, and which liability could not become fixed until after the discharge. (a)

Nor does it vary the case that the note was given by the endorser as collateral security for the payment of a debt due the holder, which was barred by the discharge.

(a) *Andrus v. Waring*, 20 Johns. Rep. 153.

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The endorser of a promissory note, who, after his endorsement, and before the note becomes payable, obtains

[* 468] his discharge as an insolvent, is not protected from payment of the note; the

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gave in evidence his discharge, as an insolvent, granted by the recorder of Albany, on the 6th of May, 1817. The defendant also proved that the note had been left by him with the plaintiffs, as collateral security for the payment of two other notes, drawn by the defendant in favor of J. Russel, and endorsed by Russel, which had been discounted by the plaintiffs, for the benefit of the defendant, and that it had been so left before those notes became payable. One of the notes was for 750 dollars, payable in July, 1816, and the other for 370 dollars, payable in September, 1816. Neither of them were paid, and they still continued in the possession of the plaintiffs. J. J. Lansing, one of the makers of the note in question, obtained a discharge under the insolvent act, on the 18th of February, 1818.

A verdict was taken for the plaintiffs, subject to the opinion of the Court; and it was agreed, that if the Court should be of opinion that the plaintiffs were entitled to recover, then judgment should be entered for the plaintiffs for 872 dollars and 83 cents, being the amount of the note, with interest; otherwise, that judgment should be entered for the defendant. The case was submitted without argument.

Per Curiam. The only question in this case is, whether the defendant's discharge under the insolvent act exonerates him from his liability as endorser of the note on which this suit is brought. The note was drawn by J. J. & H. Lansing, dated the 27th of October, 1813, and payable four years after date. It fell due, and was protested, on the 30th of October, 1817, and the defendant was discharged under the insolvent act on the 6th of May, 1817.

In the case of *Frost v. Carter*, (1 Johns. Cas. 73.) it was held, that a discharge under the insolvent act extended only to such debts as were due at the time of the assignment of the insolvent's estate, and to debts contracted for before that time, though payable afterwards. The same principle has been repeatedly recognized in subsequent cases; and it seems to be a general and well-settled rule, that if the creditor, at the time of the assignment by the insolvent debtor, has not a certain debt due or owing to which he can attest by oath, so as to entitle him to a dividend of the insolvent's effects, he will not be barred by the discharge. In the case before us, the defendant, at the time of his discharge, was not liable as endorser, and his eventual responsibility was altogether contingent. The circumstance, that this note was left as collateral security for other notes which had become due at the time of the assignment, does not prevent the application of this principle. It was analogous to personal security, where no liability existed at the time of the discharge. (a). Every thing upon which

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(a) So, if a surety, or the defendant's bail, pays the debt after his discharge, it is no bar; for until payment by the surety, no debt accrues in his favor against

the defendant's liability rested occurred after his discharge. There was no debt existing against the defendant on this endorsement, upon which the plaintiffs could have claimed a dividend. The claim on him was conditional, until the demand was made on the drawers. The plaintiffs are, accordingly, entitled to judgment for 872 dollars and 83 cents, according to the stipulation in the case.

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Judgment for the plaintiffs.

Cross against MOULTON.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error commenced an action, by warrant, in the Court below, against the plaintiff in error, on a promissory note. The defendant below relied on a set-off; *and he requested an adjournment, and said, that he had good bail present. The justice refused the adjournment, unless the defendant below would not only give bail, but swear that he could not proceed to trial for want of a material witness. The defendant refused to make the oath, and demanded a trial by jury. A *venire* was accordingly issued, and after the constable had returned a panel of jurors, the justice, without any motion by either of the parties, objected to the panel, on the ground that the jurors were not suitable, as only three of them were freeholders, and two of the number near akin to the plaintiff below; and he adjourned the Court until the next morning, when he issued a new *venire* to the same constable, directing him to summon only freeholders. The defendant below refused to attend or make any defence; and the cause was heard *ex parte* before the second jury. A verdict and judgment were given for the plaintiff below.

Where a defendant is sued in a justice's Court by war-

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rant, he is entitled to an adjournment, on giving good security for his appearance, without making oath of the want of a material witness.

A justice has no right, on his own mere motion, without any exception being taken by either party, to challenge the panel of jurors, and issue a new *venire*.

Per Curiam. The justice erred in refusing an adjournment. The statute (1 N. R. L. 389.) (a) allows a defendant sued by warrant an adjournment, on giving security. "to appear and stand trial, &c.;" and the justice had no right to require an affidavit of the want of a material witness. (*Sebring v. Wheedon*, 8 Johns. Rep. 458.)

the principal. *Buel v. Gordon*, 6 Johns. Rep. 126. *Page v. Bussel*, 2 Maule & Selw. 551. *Welsh v. Welsh and another*, 4 Maule & Selw. 333. So, if the endorser of a note pay it after the discharge of the maker; he may, notwithstanding, recover from the maker. *Frost v. Carter*, 1 Johns. Cas. 73. S. C. 2 Cases's Cas. in Error, 310. *Macdonald v. Birmingham*, 4 Term Rep. 825. And see *Mayer v. Steward*, Burr, Rep. 2430: *Lucas v. Winton*, 2 Camp. 443.

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The justice also committed a gross irregularity in challenging the jurors, on the return of the first *venire*, and in issuing a second *venire*, merely on the ground of his own extrajudicial exceptions.

Judgment reversed.

[* 471] *JACKSON, *ex dem.* W. J. LIVINGSTON, *against* BARRINGER.

Where land is leased, and is described in the lease by metes and bounds, and as containing a certain number of acres, the description by metes and bounds controls the quantity, and the lessee is entitled to hold all the land embraced by the description, although exceeding the number of acres expressed in the deed.

So, where there is a lease of the farm on which *A. B.* now lives, to contain 80 acres, and the farm actually contains more than 80 acres, the lessor cannot recover the surplus from the lessee, especially where he has been in possession, and paid rent for a length of time. (a)

THIS was an action of ejectment, for land in *Livingston*, in *Columbia* county. The cause was tried before Mr. J. *Spencer*, at the *Columbia* circuit, in *August*, 1815.

The defendant held under a lease from *Robert Livingston*, proprietor of the manor of *Livingston*, from whom the lessor of the plaintiff derived his title. The lease was to the defendant for three lives, and the premises were described as follows:—"all that farm or tract of land, being part of the said manor; beginning to wit: The farm on which *Jacobus Jose Decker* now lives on, laying east of the farm of *Jacob Miller*, west of the farm of *Andries Bartle* and *Jerry Decker*, and south of the farm of *Teunis Becker*, to contain eighty acres in one piece." The farm occupied by the defendant actually contained 149 acres and a half, and this action was brought to recover the surplus over 80 acres. It was proved, on the part of the defendant, by several aged witnesses, that the boundaries of the farm, and the extent to which it was occupied, were the same as they had been for thirty or forty years; and *Jerry Decker*, brother of *Jacobus Decker*, mentioned in the lease, a witness of about 81 years of age, testified, that the fall before the trial, he went round the farm, and that the fences were as they had been for forty years. The defendant also produced receipts from 1773 to 1813, for the rent reserved by the lease.

A verdict was taken for the plaintiff, subject to the opinion of the Court, on the above case.

E. Williams, for the plaintiff, contended, that as the lease was for only eighty acres of land, it must be so located as to give the lessee that quantity, and no more. In *Jackson, ex dem. Livingston, v. Wiley*, (9 *Johns. Rep.* 267.) which was a similar case, the Court gave no opinion as to the construction of the lease, but granted a new trial, on the ground of *a want of notice to quit. Here that question will not arise, as there has been a regular notice to quit. There can be no doubt of the intention of the lessor to lease the quantity of land only mentioned in the lease.

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(a) Vide *Lush v. Druse*, 4 *Wendell's Rep.* 313. *Wendell v. The People*, 8 *Ibid.* 183. *Jackson v. Moore*, 6 *Coven.* 706. *Preston v. Bowman*, 6 *Wheat.* 58.

Van Buren, (attorney-general,) contra, contended, that the defendant had a right to the possession of the land, comprised within the metes and bounds of the lease. The quantity of acres is matter of description; and the bounds given, being definite and certain, must prevail. (*Mann and Toles v. Pearson*, 2 Johns. Rep. 37. 40. *Jackson*, ex dem. *Staring*, v. *Deffendorf*, 1 Coines's Rep. 493.) (a) If a man grants his meadows in dale containing ten acres, and they, in fact, contain twenty acres, the whole twenty will pass. (*Bacon's Law Tracts*, 106. Reg. 25.)

Again; there has been an uninterrupted and undisputed possession for forty years, by the defendant, paying rent, and without any claim or question on the part of the lessor.

THOMPSON, Ch. J., delivered the opinion of the Court.

It is admitted that the lessor of the plaintiff is entitled to recover the premises in question, unless the defendant has a right to hold possession under the lease from *Robert Livingston* to him. The date of this lease is not stated in the case, but it was mentioned, on the argument, to have been given in the year 1772. This would seem to be inferable, also, from the receipts for rent. The description of the land as mentioned in the lease is, "The farm on which *Jacob J. Decker* now lives on, lying east of the farm of *Jacob Miller*, west of the farm of *Andries Bartle* and *Jerry Decker*, south of the farm of *Teunis Becker*, to contain eighty acres in one piece." The defendant has in his possession about one hundred and forty-nine acres, and the premises claimed are the surplus beyond the eighty acres. It is a well-settled rule, that when a piece of land is conveyed by metes and bounds, or any other certain description, this will control the quantity, although not correctly stated in the deed. The inference in such case is, that the intention was to convey the whole tract described; and the quantity of acres mentioned must yield to the more certain description. This is a principle very broadly laid down, and sanctioned by this Court, in *Mann and Toles v. Pearson*. (2 Johns. Rep. 40.) It is there stated and adopted as a settled rule, that if a man lease to another the meadows in D. and S. containing ten acres, and, in truth, they contain twenty acres, all shall pass.

The principal question growing out of the case before us is, whether it comes within this rule. It is very clear, that if the plaintiff can recover any part of the land in the defendant's possession, it must be on the southern part; for, on all the other sides, the bounds are certain and fixed, being on the farms of other persons mentioned in the description. But there is a general description or designation of the land intended to be leased, which is as certain, and more so, than the general designation of a lot by its number. It is the farm whereon *Jacobus J. Decker* now lives. It is, reasonably and fairly to be pre-

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(a) Vide *Powell v. Clark*, 5 Mass. Rep. 355.

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sumed, that this possession was known to both parties. and that it was the farm, as an entirety, thus possessed by *Decker*, that was intended to be embraced in the lease; and that the defendant has no more land in possession than *Decker* had, is very satisfactorily established by the testimony. Several aged witnesses were examined, who had known the farm upwards of forty years, and testified, that the possession was the same now as it was when they first knew it. *J. Decker*, the brother of the *Decker* mentioned as the former possessor, testified, that he had known the farm more than forty years; that he had lately gone round the fences, and found them where they had been for forty years; and that his brother's clearing was even farther south than the defendant's.

When a conveyance is thus made of an entire farm, as possessed by another person, and in reference to such possession, it would be doing great violence to the presumed intention of the parties, to suppose the whole was not intended to be conveyed. The rent has been regularly paid for the whole of the farm, as it now is, ever since the giving of the lease; and if any uncertainty exists with respect to the land intended to be included in the lease, after such a *lapse of time, the acts and acquiescence of the parties ought to have a controlling influence in the location of the premises described in the lease. Under these considerations, we think that the defendant, at this late day, ought not to be disturbed in his possession, and that he is, of course, entitled to judgment.

Judgment for the defendant.

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SPRAGUE and another *against* SEYMOUR.

In an action on a bond given for the gaol liberties, judgment for the plaintiff is to be for the whole penalty; but he cannot have execution for more than the original debt, with interest and costs. (a)

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action, in the Court below, as assignee of the sheriff of *Onondaga*, against the plaintiffs in error, on a bond given by them for the gaol liberties, in the penalty of 21 dollars. The execution of the bond, and the assignment, and the escape of *Sprague*, for whom the bond was given, having been proved, the justice rendered judgment for the plaintiff below, for 21 dollars, and costs.

Per Curiam. By the sixth section of the act relative to gaols, (sess. 36. c. 69. 1 N. R. L. 429.) (b) it is made the duty of the sheriff to take a bond in the penalty of double the sum for which the person is confined; and the seventh section makes the bond assignable to the plaintiff in the execution, and declares

(a) Vide *Gould v. Warner*, 3 *Wendell's Rep.* 54.

(b) 2 R. S. 433, 434.

that, upon obtaining judgment thereon, he shall recover the amount due in the original action, together with the interest and costs accrued thereon. It does not appear, from any part of the proceedings or proofs in this case, what the original debt was; but the judgment was correctly entered for the penalty. The plaintiff cannot have execution for more than the original debt, with interest and costs.

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v.
DRAKE.

Judgment affirmed.

***PIERCE AND PIERCE against DRAKE.**

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THIS was an action of assumpsit for goods sold and delivered. The cause was tried at the *Otsego* circuit, before Mr. J. Platt.

At the trial, the counsel for the plaintiffs offered to prove, that on the 4th of *January*, 1815, the defendant proposed to sell the plaintiffs a note drawn by the president and directors of the *Otsego* Card and Wire Manufactory, for 509 dollars and 92 cents, and also two shares in the stock of the factory, amounting to 224 dollars, and to receive payment in whisky; that the defendant fraudulently represented the company to be good and responsible, and the stock to be worth 12 or 15 per cent. above par, knowing the company to be insolvent, and the stock worth nothing; that upon this representation, the plaintiffs agreed to take the note and stock, and pay for the same in whisky on demand; that soon afterwards the defendant applied for the whisky, and the plaintiffs, not having any on hand, made their two notes, or agreements in writing, by one of which they promised to pay the defendant, by the 1st of *March*, then next, 400 dollars, in whisky, and by the other, to pay him, by the 1st of *July*, then next, 324 dollars and 50 cents, in whisky; that at the time of making the first verbal agreement, and of the delivery of the whisky, the company was insolvent, which the defendant knew, and shortly after the whisky was delivered, the company discontinued business; and that when the plaintiffs had discovered that the company was insolvent, they tendered the note and stock to the defendant, and demanded payment of the whisky, which was refused. The counsel for the defendant objected to the *testimony offered, on the ground that it was inadmissible under the declaration. The counsel for the plaintiffs then offered to prove, that at the time the contract

Where the defendant sold the plaintiff a note of the president and directors of a certain company, and also two shares of the stock of the company, for which he was to be paid in whisky, fraudulently representing the company to be good and responsible, when, in fact, he knew them to be insolvent, and the plaintiffs executed their notes or agreements to deliver the whisky at a future period, which they delivered accordingly, and having afterwards discovered the insolvency of the company, tendered to the defendant the note and stock which they had received from him, it was

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held, that the special contract was vitiated by the fraud of the

defendant, by which the presumption, that the note and stock were taken as payment, was repelled; that had the plaintiffs been sued by the defendant for the non-delivery of the whisky, his fraud would have been a defence to the action, and that the plaintiffs, having delivered the whisky, might recover the price of it, under a count for goods sold and delivered.

Where the vendor of goods is induced to take the promissory note of a third person as payment, by a fraudulent representation of the solvency of that person, the note is no satisfaction, and he may maintain an action against the purchaser for the price of the goods.

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BROMAGHIN
V.
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was made, it was expressly agreed that the note was to be taken by the plaintiffs at the risk of the defendant, and not at their own risk; but the evidence was overruled, and the plaintiffs were nonsuited.

The plaintiffs moved to set aside the nonsuit, and the case was submitted without argument.

Per Curiam. The case of *Wilson v. Force* (6 Johns. Rep. 110.) is in point to show that a note taken under such circumstances is no payment. That case also shows, that the special contract, as to the manner of payment, being void on account of the fraud, the plaintiff may disregard it, and bring assumpsit for goods sold. The fraudulent representations made by the defendants vitiated the whole contract as to payment. There can be no question that this would have been the situation of the parties, had not the plaintiffs given their notes for the delivery of the whisky at a future day; but this cannot alter the situation of the parties. Those notes were given under the same deception, occasioned by the fraudulent conduct of the defendant: they cannot be binding on the plaintiffs. This fraud would have been a good defence to these notes, had it been known to the plaintiffs before the whisky was delivered, of which, however, there is no evidence. The nonsuit must, therefore, be set aside, and a new trial awarded.

BROMAGHIN against THROOP.

A justice of the peace can in no case enter [* 477]

a judgment by confession against a defendant, unless on his appearance in Court, either in person or by attorney, or where he has been duly summoned; although the defendant authorize the justice to enter judgment against him by writing under seal, and his signature is proved before the justice, by the subscribing witness. (a)

IN ERROR, on *certiorari* to a justice's Court.

The judgment in this case was entered by the justice on a written authority, or direction, signed by the defendant *below, under seal, which authority was proved by the subscribing witness, before the justice, when the judgment was entered.

Per Curiam. In the case of *Martin v. Moss*, (6 Johns. Rep. 126.) the authority to enter judgment was also in writing, but no proof of the signature was given, and the justice acted from his own knowledge of the defendant's hand-writing. The Court, however, did not seem to place any reliance on that circumstance; but laid down the broad principle, that a justice could not legally enter a judgment, unless the defendant appeared in person or by attorney before him in Court, and confessed judgment, or had been duly summoned, as in ordinary cases. According to this principle, the judgment in question is erroneous, and must be reversed.

Judgment reversed.

(a) *Coburn v. Luther*, 9 Cow. Rep. 61. *Jackson v. Jones*, *Ibid.* 182. *Tenny v. Piler*, 9 Wendell's Rep. 569.

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Oct 1818.JACKSON, *ex dem.* BEEBE, against AUSTIN.JACKSON
v.
AUSTIN.

THIS was an action of ejectment for part of lot No. 45, in the town of *Locke*, in the county of *Cayuga*: the parties, by consent, without trial, made a case for the opinion of the Court, which was submitted without argument.

The plaintiff and defendant both derived their title from *John Van Deusen*, who went into possession of the premises in question as assignee of one *Bailey*, to whom they had been leased by *Isaac Cooper*. On the 21st of October, 1815, *Van Deusen* surrendered the lease to *Cooper*, and took a deed from him for the premises, for the consideration of 500 dollars. The lessor of the plaintiff, on the same day, at the request and for the benefit of *Van Deusen*, executed a note to *Cooper*, for the amount of the consideration money, which the lessor afterwards paid; and *Van Deusen*, on the same day, executed a mortgage to the lessor of the plaintiff, of the premises in question, as his indemnity for the note which he had given. The mortgage was duly recorded on the 31st of October, 1815, and on the 10th of November, 1817, the premises were sold, under the power contained in the mortgage, and were bid off by an agent of the lessor of the plaintiff, to whom the lessor conveyed them, and he re-conveyed to the lessor.

Previously to the execution of the mortgage, *Walter Wood* obtained a judgment in the Court of Common Pleas of *Cayuga* county, against *Van Deusen*, and one *Solomon Austin*, for 228 dollars debt, and 10 dollars damages and costs, which was filed and docketed on the 15th of September, 1815. A *fi. fa.* was issued, and the premises in question were levied upon, and were sold by the sheriff, on the 12th of March, 1816, to the defendant. A deed was executed on the same day by the sheriff to the defendant, which was duly acknowledged and recorded on the 22d of March.

Per Curiam. The question of priority will depend on the statute, (1 N. R. L. 375.) (a) which declares that whenever lands are sold and conveyed, and a mortgage is given by the purchaser, at the same time, to secure the payment of the purchase money, such mortgage shall be preferred to any previous judgment which may have been obtained against such purchaser. The mortgage in this case comes within the letter of the act. It was executed by the purchaser, *Van Deusen*, to secure the purchase money, and was given at the same time with the deed, although not given to *Cooper*, from whom *Van Deusen* derived title. But this cannot vary the principle upon which the statute appears to be founded. The lessor of the plaintiff advanced the

The preference of a mortgage given by the purchaser of lands, sold and conveyed at the same time, to secure the payment of the purchase money, to any previous judgment, which may have been obtained against

[* 478] the purchaser, is not restricted to the case of a mortgage to the vendor of the land, there being no restriction in the words of the statute concerning mortgages, sess. 36. c. 34. s. 15, by which this preference is created; and, therefore, if the purchase money be advanced by a third person, to whom the purchaser, at the same time that the conveyance is executed to him, executes a mortgage of the same land, to secure the money advanced, such mortgage is entitled to the same preference over a prior judgment, as the vendor of land would have had, had the mortgage been executed to him.

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purchase money, and took the mortgage to himself. The act probably contemplated cases where the mortgage was given to the seller of the land. But the words of the act are not restricted to such cases, and a just and fair construction *will warrant its application to the present case. The plaintiff is, accordingly, entitled to judgment.

Judgment for the plaintiff. (a)

(a) Vide *Stow v. Tift*, ante, p. 458. *Clark v. Munroe*, 14 Mass. Rep. 351.

DECKER against R. S. LIVINGSTON and others.

In an action for rent, or any other cause, accruing before marriage, in regard to the real estate of the wife, she must be joined with her husband; but for rent of her land arising after marriage, she need not be joined.

When the husband distrains and avows for rent arising from the land of his wife, without joining her in the proceedings, he must show affirmatively that the rent accrued after the marriage, for this cannot be intended;

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and if that fact be not shown, the objection may be taken at the trial.

In an action of trespass brought by tenants in common, in relation to

their land, or in debt for rent arising out of land, or in any other action merely personal, they must all join as plaintiffs, and a release of the action by one of them is a bar to the others. (b)

But in a distress and avowry for rent, which savor of the realty, tenants in common ought not to join; and therefore, if one releases the rent, it is not a discharge as to the others.

One tenant in common may, however, before distress and avowry, receive the whole rent, and discharge the lessee, for, until distress and avowry, the rent is only in the personality.

A receipt for rent arising at a subsequent period, is presumptive evidence, that all rent, previously accruing, had been paid.

THIS was an action of replevin, in which the defendants made avowry for rent arrear. The cause was tried before Mr. J. Platt, at the Columbia circuit, in September, 1817.

The defendant held under a lease from Robert Livingston, dated May 17, 1775, to Isaac Spoon and wife, reserving a rent of 50 skipples of wheat and two hens. In April, 1814, the interest in the term became vested in the plaintiff by assignment. On the death of Robert Livingston, Robert C. Livingston became possessed of the reversion, as his devisee, and on the death of Robert C. Livingston, in 1794, it descended to Robert S. Livingston, James D. Livingston, Thomas F. Livingston, John S. Livingston, and Catharine Livingston, his heirs at law. Catharine Livingston, afterwards, and before the distress on which this action is founded was made, married John C. Stevens. Robert S. Livingston, James D. Livingston, Thomas F. Livingston, John S. Livingston, and John C. Stevens, are the defendants in this suit, and they united in making the distress, but Catharine was not joined. The defendants distrained upon the plaintiff, on the 16th of October, 1815, for 173 dollars, for rent due on the 1st of January preceding.

*The plaintiff produced in evidence two receipts, signed by the defendant, John S. Livingston; one dated the 10th June, 1815, by which he acknowledged that he had received from the plaintiff 37 and a half bushels of wheat, for the rent of his farm, due the 1st of January, 1815; and the other dated the 6th of April, 1816, for 37 and a half bushels of wheat, for the rent of his farm, due the 1st of January, 1816.

(b) *Sherman v. Ballou*, 8 Conn. Rep. 304.

A verdict was taken for the plaintiff, by consent, subject to the opinion of the Court, on a case containing the facts above stated.

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Van Buren, (attorney-general,) for the plaintiff. 1. The proceedings were irregular. The distress was for rent due many years before, and before the marriage of *Catharine Livingston* with *Stevens*. She ought, therefore, to have been joined. Avowry is in the nature of an action, and all parties having an interest must be joined. (*Pullen v. Palmer*, *Carth.* 328. *Page v. Stehman*, *Carth.* 364.) In an avowry for rent upon a lease for life, or years, before coverture, the husband and wife must join. (2 *Com. Dig.* 105. *Baron and Feme*, (V.) It cannot be pleaded in abatement. (*Harrison v. McIntosh*, 1 *Johns. Rep.* 380.)

2. The receipts offered in evidence, of the rent for the last two years, are *prima facie* evidence that the rent for all the former years had been paid; and not being explained or rebutted by any evidence on the part of the defendants, are sufficient to entitle the plaintiff to judgment. (1 *Sid.* 44. *Co. Litt.* 373. *a.* 3 *Co.* 65. *b.* 1 *Exp. Dig.* 71. (Debt.)

Vanderpool, contra. 1. There is no irregularity. It was not necessary for Mrs. S. to be joined in the avowry. The cases cited are those of joint tenants or coparceners, and do not apply to tenants in common. It does not appear that the rent for which the distress was made, was due before the marriage of *Catharine L.* with the defendant S. It is laid down by *Chitty*, (*On Pleadings*, 19. 20.) that the rent or other cause of action, accruing during the marriage, on a lease, or demise, or other contract, relating to the land or other real property of the wife, whether such contract was made before or during coverture, the husband and wife may join, or he may sue alone. (*Str.* 230. 1 *Wils.* *224. 2 *Lev.* 107. *Reeves's Domes. Relat.* 30, 31.) The 19th section of the act concerning *Distresses, Rents, &c.* (1 *N. R. L.* 439. sess. 36. ch. 63.) is express, that husbands, having estates in right of their wives, may sue for the rents by action of debt, or distrain and make avowry, &c. The distinction between joint tenants and tenants in common is laid down in *Pullen v. Palmer*, (3 *Salk.* 207.) which was an action of replevin; and the Court held, that the husband may distrain for rent due to his wife, and avow for it alone, because the right to the rent due is in him alone. So, in *Bowles v. Poore*, (*Cro. James*, 282, 283.) it was objected that the avowry was bad, because it appeared that the rent in arrear was not due to the husband, but only to the wife *dum sola fuit*; but the objection was overruled. *Tenants in common* must sever in their *avowries*, for their interest is separate and distinct. (1 *Chitty*, Pl. 544. 2 *Chitty*, 514. 5 *Comyn's Dig. Rent.* (B.) 424. *Co.* 375

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Litt. 198. 285. 3 *Bac. Abr.* 671. (A.) *Id.* 690. (H. 2.) *Harrison v. Barney*, 5 *Term Rep.* 247.)

2. The receipts of *John S. L.* can be no bar to the rents due from the tenant in 1814. The cases cited do not bear out the doctrine contended for by the plaintiff, and laid down in some treatises and elementary books. The cases speak of *releases or acquittances under seal*, which may be pleaded in discharge. Again; the receipt of *J. S. L.*, alone, is no bar to the rights of the other tenants in common: the tenant was not authorized to pay their proportions of the rent to him. (*Harrison v. Barney*, 5 *Term Rep.* 247. 249.)

SPENCER, J., delivered the opinion of the Court. Two questions have been made on the argument: 1. Whether the wife of *John C. Stevens* ought to have been a party to the suit; and, 2d. whether the receipts of one of the tenants in common for the rent of 1815 and 1816 are available as *prima facie* evidence of the payment of the rent of the antecedent years.

The rent for which the distress was made, accrued prior to October, 1815, but the case does not disclose for what years it grew due. *Mrs. Stevens*, who is one of the tenants in common, is not joined in making the distress, or *avowry*, with her husband; and it does not appear whether the rent claimed accrued before or after their marriage.

We consider the law well settled, that for rent, or any other cause of action accruing before marriage, in regard to the real estate of the wife, she must be joined with her husband in a suit for such cause of action, but that for rent of her land arising after the marriage, she need not be joined. (1 *Chitty*, Pl. 17. 20, and the authorities there cited.) As it does not appear affirmatively, that the rent in question accrued after the intermarriage between *Stevens* and his wife, we cannot intend the fact to be so; her husband's right to sue, alone, resting on the fact, that the rent accrued after the marriage, his title is defective, if the fact is not shown; and this objection may be made on the trial, (1 *Chitty*, 7.)

We held, in *Austin and others v. Hall*, (13 *Johns. Rep.* 286.) that a release by one tenant in common of a trespass on the lands of another tenant in common, was a bar to the action brought by them, on the principle, that the action was strictly personal, and that the plaintiffs were bound to join in it; and there can be no doubt that when there is such a unity of interest as to require a joinder of all the parties interested in a matter of a personal nature, the release of one is as effectual as the release of all.

If two tenants in common make a lease of their tenement for a term of years, rendering rent, if the rent be behind, they

shall have an action of debt against the lessee, and not divers actions, for the action is in the personalty. (*Co. Lit.* sec. 316. 198. b.) But in an avowry for the rent, they ought not to be joined, for this is in the realty; (*Co. Lit.* s. 317.) and this distinction between debt for rent and an avowry, appears to have been uniformly recognized. (1 *Chitty*, 544.) The reason is, that the avowry savors of the realty; but until the distress and avowry, the rent is in the personalty, and then it can be released by one of the tenants in common. It is the distress on the land which makes the rent partake of the realty. The case of *Harrison v. Barney*, (5 *Term Rep.* 249.) on which very great stress was laid, simply determines that a tenant, holding under two tenants in common, cannot pay the whole rent to *one of them, after notice from the other not to pay it. If he do, the other tenant in common may distrain for his share. Lord *Kenyon* puts his decision on the justice of the case, and that the payment was against conscience.

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Whether the receipts for 1815 and 1816 are presumptive evidence of payment of the rent of the preceding years, depends on the right of one tenant in common to receive the whole rent. If he had such a right, then the presumption exists; and it arises from the improbability that the former rent remained unpaid, when rent is specifically received for a subsequent period; and this presumption obtains as well where several persons are entitled to receive money, as in an individual case, for they are all to be presumed consensual of their rights. This presumption may be repelled, but standing uncontradicted, as it does here, it is decisive. (a)

Judgment for the plaintiff.

(a) *Baldwin v. Mason*, 2 *Wendell's Rep.* 399. *Beckman v. Bruns*, 7 *Cow. Rep.* 29.

WHITBECK against COOK AND WIFE.

THIS was an action of covenant, for the breach of the covenants contained in a conveyance of land. The cause was

In assigning
a breach of a
covenant for
quiet enjoy-

ment, contained in a conveyance of land, the plaintiff must show an entry, and expulsion from, or some actual disturbance in the possession. (b)

It is not a breach of the covenants, that the grantor was lawful owner of the land, was well seised, and had full power to convey, that part of the land was a public highway, and was used as such; a public highway being a mere easement, and the seisin, and right to convey, still continuing in the owner of the land over which it was laid out. (c)

Where a husband and wife execute a conveyance, in which they both covenant to the grantee, the wife cannot be joined with her husband in an action for a breach of the covenant, her acknowledgment having no further effect than to convey her interest in the land, and not binding her by the covenants contained in the deed. (d)

Where husband and wife are improperly joined, as defendants in an action, it seems, that if the plaintiff has a cause of action against the husband, he will be allowed to enter a *noli prosequi*, as to the wife.

(b) *Vide Dyett v. Pendleton*, 4 *Cowen*, 581. *S. C.* 3 *Cowen*, 727. *Lansing v. Van Alstyne*, 2 *Wendell* 663 (n).

(c) *Vide supra*, 447.

(d) *Vide Jackson v. Vanderheyden*, 17 *Johns. Rep.* 167.

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brought before the Court on demurrer, on a case made after verdict, and on a motion in arrest of judgment.

The declaration stated, that, by deed, bearing date the 5th of April, 1814, *Philip* and *Clarissa Cook*, the defendants, by the name and description of *Philip Cook* and *Clarissa * Cook*, his wife, in consideration of the sum of 8,093 dollars and 25 cents, conveyed to the plaintiff, in fee, a certain piece or parcel of land, in the town of *Warren*, in the county of *Herkimer*, containing 269 acres, three quarters, and four roods; and that the said *Philip* and *Clarissa*, by the said deed, covenanted, 1. That they, at the time of the sealing the same, were the true and lawful owners of the premises, with the appurtenances; 2. And were lawfully seised in their own right of a perfect, absolute, and indefeasible estate of inheritance in the premises; 3. And that they had, in themselves, good right, full power, and lawful authority, to grant and convey the same; 4. And, also, that the plaintiff, his heirs and assigns, should, and might, forever thereafter, peaceably have, hold, occupy, and possess, the premises, free from hindrance or molestation, of any person or persons lawfully claiming the same. The plaintiff then assigned as breaches, 1. That the defendants were not, at the time of the sealing the deed, the true and lawful owners of eleven acres, two roods, and twenty perches of the land described and conveyed in the deed; 2. And were not lawfully seised, in their own right, &c., of, and in, eleven acres, two roods, and twenty perches, thereof; 3. And had not good right, &c., to grant and convey the said eleven acres, two roods, and twenty perches; 4. And that the plaintiff "hath not been suffered to have, hold, occupy, and possess, eleven acres, two roods, and twenty perches, of the said land and premises, the same being part and parcel of the said land and premises, so conveyed as aforesaid, free from the hindrance or molestation of any person or persons lawfully claiming the same; but the said eleven acres, two roods, and twenty perches, of the said land, parcel of the said land and premises so conveyed, as aforesaid, were, at the time of the making the said indenture in writing, and for a long time before that, and ever since, have been a common and a public highway, agreeable to the laws and statutes of the state of *New-York*, and have, for all the time aforesaid, been used, occupied, possessed, and enjoyed, by the people of the state of *New-York*, as such common and public highway."

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To this declaration the defendants pleaded, 1. *Non est *factum*. 2. To the first, second, and third breaches, that they were lawful owners, &c., and were lawfully seised, &c., and had, in themselves, good right, &c., pursuing the words of the breaches assigned by the plaintiff. To this plea the plaintiff replied, taking issue thereon.

To the fourth breach the defendants demurred, and showed, for causes of demurrer, that it does not allege any eviction, disturbance, or molestation, in the enjoyment, possession, or occu-
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pation of the said eleven acres, two roods, and twenty perches; and that it is, in other respects, uncertain, informal, and insufficient, &c. The plaintiff joined in demurrer.

The cause was tried before Mr. J. Platt, at the *Herkimer* circuit, in June, 1817. The deed declared upon was produced in evidence, and it appeared to be duly executed and acknowledged by both the defendants. It was admitted, that a part of the land conveyed was, as mentioned in the declaration, a public highway. The counsel for the defendants moved for a nonsuit, on account of the improper joinder of the wife, who, it was admitted, had no interest in the land, except a right of dower; but the motion was denied. A verdict was taken for the plaintiff, by consent, subject to the opinion of the Court, on the three first breaches assigned in the declaration, and contingent damages were assessed on the fourth.

The defendants moved in arrest of judgment, on the ground that the wife was not bound by the covenants contained in the deed, though acknowledged according to the statute; or, if she was bound, then the declaration should have stated her acknowledgment.

Talcot, for the defendants. 1. In support of the demurrer to the fourth breach assigned in the declaration. The breach alleged is, that some part of the premises conveyed, was, and is, a public highway, and used as such. But to show a breach of the covenant for quiet enjoyment, the plaintiff should have alleged an entry by the plaintiff, or an eviction, or some actual disturbance in the possession. (*Waldron v. M' Carty*, 3 *Johns Rep.* 471. *Kortz v. Carpenter*, 5 *Johns. Rep.* 120. *Sedgwick v. Hallenback*, 7 *Johns. Rep.* 380.)

*At the common law, there were two modes of taking advantage of a warranty; one by *voucher*, and the other by the writ of *warrantia chartæ*; but in neither case could the party recover, unless he was in possession, and had been evicted or disturbed. Since covenants have been introduced into conveyances, the rule is the same. That the grantee cannot get into possession of his land, is no breach of the warranty. *A fortiori*, there is no breach of the covenant here, as the highway is a mere *easement*. (1 *Saund.* 322. a. note 2. *Hob.* 12.)

[THOMPSON, Ch. J. You need not argue this point further. It is settled, that there can be no breach of this covenant, unless there has been an eviction, or disturbance of the possession.]

2. As to the facts of the case. The existence of a public highway through the premises, was no evidence of a breach of the covenant of seisin; it could, therefore, be no measure of damages for the breaches of covenant, to be assessed by the jury at the trial. The original owner of the soil, in laying out a highway, gives merely the *use* of the land to the public. The

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ownership and seisin still remain in him, or his heirs or assigns. He may maintain trespass for any exclusive appropriation of it by another. (*Cortelyou v. Van Brundt*, 2 Johns. Rep. 357.) To maintain trespass, the plaintiff must be in possession; and seisin is the possession of a freehold. If the defendant, then, had the seisin, subject only to an easement or right of way over a part of the premises, it follows, that there has been no breach of this covenant.

Again; the plaintiff ought to have been nonsuited. The wife was not liable on the covenant, and could not, therefore, be joined in the action. Both defendants having pleaded jointly, there can be no judgment against the husband alone. This misjoinder of the wife may be taken advantage of under the general issue. (1 Chitty, Pl. 32. 45. 2 Vin. Abr. tit. Actions. Joinder. (D. d.) pl. 8.) There is an allegation of a contract made by both defendants, when, in fact, it is a contract by the husband alone.

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3. The judgment must be arrested. The wife was not *bound by the covenants in the deed. At common law, the only mode in which a *feme covert* could pass her estate was by fine, or common recovery. But in this country, she may pass her estate, or bar herself of dower, by joining in the deed of conveyance with her husband. (*Fowler v. Shearer*, 7 Mass. Rep. 14—20.) (a) Our statute has provided, that she may pass her estate, by her deed, on a previous acknowledgment made by her, on a private examination before certain judges or officers. (1 N. R. L. 369.) (b) The covenants in the deed are not necessary to pass the estate; and though the wife may be estopped by her covenants, she is not answerable for a breach of them. (7 Mass. Rep. 191. *Colcord v. Swan*.)

If she could be liable at all on the covenant, it can only be when she has duly acknowledged her deed according to the statute; and that is a material fact necessary to be averred in the declaration, in order to support the action. (2 Sand. 176, n. 3. *Brook's Abr. Debt.* pl. 193.)

If the wife is not to be considered in Court, the plaintiff cannot recover, for the statute regulating proceedings as to joint debtors, does not apply to this case.

Ford, contra. There was no misjoinder of the wife. The husband alone was taken. The plea is *non est factum* by the husband, as to both defendants. The issue is, whether this is their deed. It is admitted that it is her deed, for the purpose of passing her estate. If it is her deed for any purpose, the issue on the part of the plaintiff is maintained. The declaration is supported. There is no variance between the allegation and the proof.

(a) Vide *Jackson, ex dem Woodruff and others, v. Gillchrist*, ante, p. 89, and *Van Buren, arguendo*, p. 96.

(b) 1 R. S. 753.

Next, as to the other pleas to the first, second and third breaches assigned; the defendants say, that they were lawfully seised, &c. If they cannot avail themselves of the coverture, under the general issue of *non est factum*, neither can they under these pleas. The facts stated in the fourth assignment of breaches, in the declaration, may be given in evidence to support the other breaches assigned. The existence of the public highway was a breach of the covenant, *that the defendants were seised of an *absolute and indefeasible state of inheritance* in fee simple in the premises. These words imply that they had the sole, exclusive, and uncontrolled dominion and enjoyment of the estate which they so conveyed. Suppose there had been an outstanding term of 900 years, would that not be an encumbrance, and a breach of the covenant? To support an action on the covenant of seisin, it is not necessary to aver or prove an eviction. (*Pollard v. Dwight*, 4 *Cranch Rep.* 421. *Bender v. Fromberger*, 4 *Dallas*, 436. *Duvall v. Craig*, 2 *Wheat. Rep.* 45. 61.) If the grantor is not seised, the covenant is broken immediately. (*Greenby and Kellogg v. Wilcocks*, 2 *Johns. Rep.*) (a) A preëxisting title in another, so as

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(a) In *Greenby and another v. Wilcocks*, the plaintiffs were administrators of *Kellogg*, to whom the land was conveyed by *Hardenbergh*, who was possessed of the premises under a deed from *Pollock*, the grantee of the defendants, who conveyed the lands with the usual covenants of seisin, &c., for the breach of which the action was brought; and the Court held, (*Livingston, J.* dissenting.) that, there being a total defect of title in the defendants when they conveyed to *Pollock*, the covenants were broken, as soon as they were made, and being *chores in action* which could not be assigned at common law, the plaintiffs could not sustain the action, though the intestate was evicted, in his lifetime. In *Hamilton and others v. Wilson*, (4 *Johns. Rep.* 72.) an action was brought by the heirs of *J. H.* against the defendant, for a breach of the covenant of seisin made by the defendant to their ancestor; and the breach was assigned generally. It was moved, in arrest of judgment, that the covenant, if broken at all, was broken as soon as it was made, and did not descend with the land to the heir; and that, therefore, the plaintiffs could not maintain the action; but that the suit should have been brought by the personal representatives of *J. H.* And the Court held, that the heirs could not support the action, and the judgment was arrested. In *Kingdon v. Nottle*, (1 *Mauls & Selwyn's Rep.* 355.) the plaintiff brought an action, as executrix of the grantee, for a breach of the covenants of seisin, &c., made by the defendant to the testator, and assigned breaches generally, negating the words of the covenant; and, on special demurrer, the declaration was held bad; and that the executrix could not maintain an action, without showing some special damage to the testator in his lifetime, or that she had an interest in the land; for if the executrix was allowed to recover, it must be to the full amount of the damages for the defect of title; and, in that case, the recovery would bar the heir of his action. That these were real covenants which run with the land and go to the assignee of the land, or descend to the heir, and must be taken advantage of by him alone. That the testator might have sued in his lifetime; but not having done so, the covenant and the right to sue thereon, devolved with the estate upon the heir; and it was distinguished from the case of *Lucy v. Livingston*, (2 *Lev.* 26. 1 *Vent.* 175. *S. C.*) where there was an actual damage accruing to the testator, in his lifetime, by his eviction. An action was, afterwards, brought by *Kingdon*, as devisee in fee, against *Nottle*, (4 *Mauls & Selwyn*, 53.) for a breach of the same covenants, and there was a demurrer to the declaration, because the supposed breaches were committed in the lifetime of the testator, before the plaintiff had any interest in the premises, and because it did not appear from the declaration, that the plaintiff, since the death of the testator, had been interrupted or disturbed in the possession, or sustained any damages, &c.; but it was held that the action was maintainable. Lord *Ellenborough* said, that though, according to the letter, the breach was in the testator's lifetime, yet,

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*to hinder the entry of the grantee, is equivalent to an eviction. A paramount title existing in another, is an encumbrance. (*Prescott v. Truman*, 4 Mass. Rep. 627.) In *Kellogg v. Ingersoll*, (2 Mass. Rep. 97.) it was held by the Supreme Court of Massachusetts, that a public highway over the land conveyed was an encumbrance, and a breach of the covenant that the premises were free from encumbrances, &c. If the action cannot be maintained against the wife, it is supported against the husband, the party before the Court. If the husband is bound by the covenants, and the action is supported as to him, then the judgment cannot be arrested as to him.

Talcott, in reply, said, that in the cases of *Duvall v. Craig*, *Prescott v. Truman*, and *Kellogg v. Ingersoll*, there were special covenants that the premises conveyed were, and should remain, free from all encumbrances. There was no such covenant in the pleadings in this case. By the pleadings, judgment is demanded against both defendants. If the wife is not to be considered a party in Court, then the objection in arrest is well founded.

SPENCER, J., delivered the opinion of the Court. In this case, the defendants have demurred to the fourth breach assigned in the declaration. A motion has also been made *in arrest of judgment; and the parties have submitted a third question, whether the plaintiff is entitled to recover, under the facts in the case, upon the covenants in the deed, that the defendants, at the time of sealing the indenture, were the true and lawful owners of the premises conveyed, and were lawfully seised in their own right of a perfect, absolute, and indefeasible estate of inheritance, in fee simple, of and in the premises; and that they had good right, full power, and lawful authority to grant and convey the same. The facts are admitted to be, that the deed conveys a tract of land containing 269 acres and three quarters, eleven acres, two roods, and twenty perches whereof, and included in the general boundaries, were at the

according to the spirit, the substantial breach was in the time of the devisee, who had thereby lost the fruit of the covenant, in not being able to dispose of the land. That the covenant passed with the land of the devisee, and had been broken in the time of the devisee; for so long as the defendant had not a good title, there was a continuing breach; that it was not like a covenant to do an act of solitary performance, which not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require. *Dampier*, J., said it was a covenant which runs with the land; but if it could be broken but once, and ceased *so instanti* that it was broken, how could it be a covenant which runs with the land? So, in *King v. Jones and another*, (5 Taunt. 418.) which was an action brought by the heir of a grantee against the executors of the grantor, for a breach of the covenant for further assurance, the ancestor had, in his lifetime, requested his grantor to levy a fine, which was not done, and after the death of the ancestor, the heir was evicted; and it was held by the Court of C. B., that the heir might maintain the action; for though the breach was in the lifetime of the ancestor who might have sued, yet it was a breach, the ultimate or consequential damages of which were sustained by the heir.

time of executing the deed, for a long time before, and ever since have been, a common and public highway, agreeably to the laws of the state, and have been so used, possessed, and enjoyed as a public highway.

The fourth breach, to which the demurrer is taken, is founded on another covenant in the same deed, for quiet enjoyment, and the breach is the same as upon the other covenants, the existence of the highway. The motion in arrest of judgment is founded on this, that a *feme covert* cannot be used on a covenant contained in a deed, inasmuch as she is incapable, during coverture, to bind herself, by deed, to respond in damages.

The demurrer is well taken. It has been repeatedly decided in this Court, that the covenant for quiet enjoyment extends to the possession only, and not to the title, and is broken only by an entry and expulsion from, or some actual disturbance in the possession. (3 *Johns. Rep.* 471. 5 *Johns. Rep.* 120.)

The statute authorizing and making valid a conveyance of land by a *feme covert*, who shall be duly examined privately and apart from her husband, before some proper officer, and who shall, on such examination, acknowledge that she executed such deed freely, without any fear or compulsion of her husband, alters the common law no further than merely to enable the *feme covert* to convey her interest in the land intended to be conveyed: it is, in that respect, a substitute for levying a fine; but beyond that, and as *regards collateral covenants, the rule of the common law prevails, and a *feme covert* is not bound by such covenants.

The principal question relates to the supposed breaches of the covenants, that the defendants were lawful owners of the whole tract, including the road, that they were seised, &c., and had full power to convey, &c.

It must strike the mind with surprise, that a person who purchases a farm, through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn round on his grantor, and complain that the general covenants in the deed have been broken, by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say, that such an attempt is unjust and inequitable, and contrary to the universal understanding of both vendors and purchasers. If it could succeed, a flood gate of litigation would be opened, and for many years to come, this kind of action would abound. These are serious considerations; and this Court ought, if it can, consistently with law, to check the attempt in the bud.

We have, after the most mature consideration, in the case of *Jackson*, ex dem. *Yates and others*, v. *Hathaway*,† decided, that the existence of a road through a person's land was a mere easement; that his fee and title to it, subject to the easement,

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existed in full vigor, and that, on the disuse of the road, he had a right to maintain an ejectment to recover possession. This decision then establishes, that the owner of the soil is the lawful owner; that he is seised, and has power to convey. This being so, the covenants contained in the deed under consideration are not broken.

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The case of *Kellogg v. Ingersoll* (2 Mass. Rep.) (a) has been cited, to show that the existence of a town road is a breach of a covenant against encumbrances. The first answer to that case is, that the plaintiff here counts on no such covenant, and the second is, that we should choose to consider *the point further, before we assented to the doctrine of that case.

If the plaintiff had a right to recover, probably we would allow him to enter a *noli prosequi*, as against the wife, and take judgment against the husband; but believing the plaintiff not entitled to recover, the defendants must have judgment. (b)

Judgment for the defendants.

(a) Vide *Peck v. Smith*, 1 Day's Connec. Rep. 103.

(b) Vide *Addenda*, infra, 545.

PAYNE against WHEELER.

Where a cause in a justice's Court has been once adjourned by consent of parties, a second adjournment cannot be granted at the instance of the plaintiff.

IN ERROR, on *certiorari* to a justice's Court.

The action in the Court below was brought by the defendant in error against the plaintiff in error. On the return of the summons, the parties adjourned the cause by consent, and when they appeared on the adjourned day, the plaintiff below requested a further adjournment, and made oath that a material witness who had been subpœnaed did not attend. The defendant below objected to the adjournment, but the justice granted it for six days: at the expiration of that time, the defendant not appearing, the cause was tried, and a verdict and judgment rendered for the plaintiff below.

Per Curiam. In *Dunham v. Hayden*, (7 Johns. Rep. 381.) it is said that the only authority to adjourn, unless at the instance of the defendant, is contained in the second section of the act, and such adjournment must not exceed six days. In *Kilmore v. Sudam*, (7 Johns. Rep. 530.) it is held, that the right of the justice to adjourn a case on his own motion, must be claimed and exercised, if at all, at the return of the process; and if the first adjournment is by consent of parties, no subsequent adjournment can be made on the motion of the justice. These cases are conclusive to show, that the second adjournment in the case now before us was without authority; and the judgment must be

reversed, which is much to be regretted, as justice appears to have been done, and no more has been recovered than the defendant below admitted to be due.

Judgment reversed.

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WOODWARD
v
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*WOODWARD against PAINE AND LAKE.

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THIS was an action of trespass, for taking and carrying away a pair of horses, wagon, and harness. The cause was tried at the *Durhess* circuit, in 1817.

The defendant *Paine* was a justice of peace in the county of *Duchess*. In July, 1816, an action was brought before *Paine*, by one *Hannah Betts*, against the plaintiff in this suit, for an assault and battery. A written plea to the jurisdiction of the justice was interposed, and overruled; and during the trial, the counsel for *Woodward* strenuously objected to the justice proceeding in the cause, and stated to him that the judgment would be void, and all acting under it would be trespassers. The justice, however, persevered, and *H. Betts* obtained a verdict and judgment for 15 dollars. An execution was issued thereon, and delivered to the defendant *Lake*, a constable, who seized the goods in question, but left them with the plaintiff until the time of sale, when they were purchased by *Hine*, for about 19 dollars. *Andrew Lake*, a witness on the part of the plaintiff, testified, that soon after *Hine* purchased the horses, he sold them to *Daniel Lake* for 225 dollars, and that *Daniel Lake* sold them to the witness for 227 dollars and 50 cents; that the witness bought them for the plaintiff, and that the plaintiff gave the witness his note for 230 dollars, and also 2 dollars in cash, the difference of the price being intended, as the witness alleged, to compensate him for his trouble. This witness, being pressed, on his cross-examination, was hesitating and incoherent in his answers, especially when questioned as to the reason why the plaintiff had paid him 2 dollars in cash.

Several witnesses were produced on the part of the defendant, to prove circumstances from which it might be inferred that *Hine* purchased as the agent of, and with money furnished by, the plaintiff; as, that *Hine*, who lived in the plaintiff's family, was very poor, and unable to pay the money which he had bid at the constable's sale; but there was no direct evidence

Where a justice of the peace tried an action for an assault and battery, and gave judgment for the plaintiff for 15 dollars, and issued execution thereon, under which the constable levied on and sold a pair of horses, wagon and harness; in an action of trespass by the defendant against the justice and constable, in which he obtained a verdict for 270 dollars, the Court refused to grant a new trial, although there was reason to believe that the justice had not acted maliciously, but under a mistake as to the extent of his jurisdiction, and there were strong circumstances to show that the party himself had, through his agent, purchased the goods sold under the execution, at a

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price about equal to the amount of the judgment.

Against him, so that he could have sustained no greater injury than the amount of the judgment; but still the case admitted of doubt, and the question was fairly submitted to the jury. (a)

The admissions and declarations of a person, who is himself a competent witness, cannot be given in evidence. (b)

(a) Vide *Root v. King*, 7 Cow. Rep. 613. *Sargent v. —*, 5 Ib. 100, 351. *Winchel v. Latams*, 6 Cow. 682. *Artu v. Union Ins. Co.* 7 Ib. 202.

(b) Vide *Mills v. Tiest*, 8 Johns. Rep. 121. *Alexander v. Maline*, 11 Ib. 125.

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to this effect. The counsel for the defendants offered to prove declarations of *Hine*, that he had been furnished by the plaintiff with money for the purpose of bidding for the horses; but the judge rejected the testimony. It also appeared that *Hine* had kept out of the way, to avoid being subpoenaed by the defendants, and that, after he had been subpoenaed, he absented himself from the trial.

The judge charged the jury that the plaintiff was entitled to recover, as the justice had no jurisdiction in the cause which he tried, and therefore his judgment was void, and all acting under it were trespassers: that if the jury believed that the justice had acted from ignorance merely, and that his intentions were good, they ought to give such damages only as would compensate the plaintiff for the actual loss that he had sustained: that to determine this point, it would be proper for them to consider the manner in which the sale was made, and how the property was afterwards disposed of, and to determine whether there had been any collusion between the plaintiff and the purchaser, by which the plaintiff obtained his property again, without paying more than the amount of the judgment; or whether he had actually given the value of it: that the testimony of *Andrew Lake* was positive as to the fairness of the transaction, but it was opposed by many strong circumstances; and circumstances frequently afforded more satisfactory evidence than positive proof: that from the testimony, he was inclined to think that the sale of the horses was collusive, but this was a question for the decision of the jury; and that if the jury believed, from the testimony, that the defendants had acted from improper motives, and knowingly, they might give a verdict, not only for the actual damage sustained by the plaintiff, but in addition, for smart money, for the oppression and vexation which they had created.

The jury found a verdict for the plaintiff for two hundred and seventy dollars, which was about the value of the property in question.

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Swift, for the defendants, now moved to set aside the verdict, *and for a new trial. 1. Because proper testimony had been rejected. 2. Because the verdict was against evidence. 3. For the misdirection of the judge. He contended, that the evidence of the declarations of *Hine* ought to have been admitted. If he was an agent of the plaintiff, it was, no doubt, admissible; (*Mutt. v. Kip. 10 Johns. Rep. 478.*) but if he was not, yet the manner in which he took possession of the property, his declaration at the time, and the character in which he acted, were part of the *res gesta*, and ought to have been received in evidence. (*Waring v. Warren, 1 Johns. Rep. 340. 4 Johns Rep. 230. 1 Johns. Rep. 159.*)

2. The true measure of damages is what the plaintiff actually lost; which was 19 dollars, and no more.

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Hooker and *P. Ruggles*, contra, insisted, that the evidence of the declarations of *Hine* was properly rejected. Though, in some cases, in ejectment, evidence of the declarations of a tenant has been received, yet it has been only to satisfy doubts as to the character of the possession under the circumstances, and never as to the title. The declarations admitted were, in some degree, against the interest of the person making them. (*Phillips's E.* 182. and note (a) 6 *Johns. Rep.* 19—21.)

It is, however, regarded as a dangerous species of evidence, and the admission of it is an exception to the general rule.

The counsel next went into examination and discussion of the facts to show that the verdict was supported by the evidence.

Per Curiam. The motion for a new trial in this case must be denied. From the nature of the cause, and the testimony that was given, there was room for an honest difference of opinion as to the conduct of the defendants, and as to the damages sustained by the plaintiff. We are inclined to think that the better conclusion is, that the magistrate acted under an honest and real impression that he had jurisdiction of the case before him. The testimony is pretty strong to show that the property was purchased in, under the constable's sale, for the benefit of the plaintiff, so that he has only sustained damages to the amount of the *judgment against him. But the testimony on both these questions might well be considered doubtful: it depended very much on the credibility of witnesses, and it was fairly submitted to the jury; and we cannot say that they have so much erred as to warrant us in interfering and setting aside the verdict.

The declarations and confessions of *Hine* were properly excluded. He was a competent witness, and his confessions could not be received in evidence. There was no direct proof that he was the plaintiff's agent, or acted in his behalf. Upon the whole, although the damages are higher than we think they ought to have been, yet, as it is an action sounding in tort, the verdict must stand.

Motion denied.

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BALDWIN

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Where, in a justice's Court, the cause has been adjourned to a future day, at a certain hour, when the defendant appears, but the justice does not arrive until an hour after, and, in about twenty minutes, is followed by the plaintiff, and the defendant, on seeing the plaintiff, goes away, declaring that the cause is out of Court, although apprized by the justice that he should call it immediately, the delay does not, under the circumstances of the case, amount to a discontinuance, and a judgment rendered for the plaintiff on an *ex parte* hearing, will not be set aside, as the defendant must be deemed to have voluntarily abandoned the cause. (a)

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ately, the delay does not, under the circumstances of the case, amount to a discontinuance, and a judgment rendered for the plaintiff on an *ex parte* hearing, will not be set aside, as the defendant must be deemed to have voluntarily abandoned the cause. (a)

BALDWIN *against* CARTER.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below against the plaintiff in error, in which, after issue joined, the cause was adjourned to a future day, at two o'clock in the afternoon. The defendant below appeared at the time, but the justice did not come until three o'clock, or a little after, when, the plaintiff below not having arrived, the defendant urged the justice to call the cause. The justice, however, delayed until about twenty minutes after three, at which time the plaintiff appeared, and the defendant, on seeing him, went away, declaring that the cause was out of Court, by reason of the delay, although the justice apprized him that he should call the cause immediately. The trial proceeded, and verdict and judgment were given for the plaintiff below.

Per Curiam. The only point in this case is, whether the delay was such as to authorize the defendant below to consider the cause discontinued; and we think, under the circumstances stated in the case, that it was not. The defendant *waited until the justice and plaintiff both arrived, and was apprized by the justice that he was about calling the parties. The defendant, therefore, wilfully absented himself after he knew that the trial was to take place: he must, therefore, be considered as having voluntarily abandoned his cause. (12 *Johns. Rep.* 217.) Had he gone away before the plaintiff appeared, and under an impression that the cause would not be called, the delay, perhaps, was such as might now entitle him to relief; but the circumstances under which he withdrew destroy all ground of complaint. The judgment must, accordingly, be affirmed.

Judgment affirmed.

(a) What delay will work a discontinuance: see *M'Carty v. M'Pherson*, 11 *Johns. Rep.* 407. *Wilde v. Dunn*, *Id.* 459. *Myer v. Fisher*, *infra*, 504. *Stoddard v. Holmes*, 1 *Cowen*, 246.

SHEPARD against RYERS.

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v.
RYERS.

THIS was an action of *assumpsit*. The declaration contained five counts on a special agreement, and the common *in debitatus* counts. The cause was tried before Mr. J. Platt, at the Tioga circuit, in June, 1817.

At the trial, the plaintiff gave in evidence a covenant, or agreement, under seal, dated the 2d of November, 1809, and executed by the plaintiff and defendant, which are as follows:—

“Whereas John Shepard, of the town of Athens, in the state of Pennsylvania, and John P. Ryers, of the town of Painted Post, in the state of New-York, were joint owners of a certain tract of land, situated in the town of Spencer, *in the county of Tioga, and state of New-York, called the *Schoolcraft Location*, containing 2,600 acres of land; and whereas the said John P. Ryers's part or share of said tract of land, which was two thirds, was sold at public auction by the sheriff of Tioga county, and bid off by John H. Avery and Joshua Ferris, and for which they have received a deed from the said sheriff; and whereas the said John Shepard has agreed to procure from the said John H. Avery his claim or title to the said tract of land, released to the said John P. Ryers, and the said Ryers agrees to procure the claim or title of said Joshua Ferris to the said tract of land; and whereas the said John Shepard and John P. Ryers have agreed to have the said tract of land divided, that is to say, the said Ryers to have two thirds, and the said Shepard one third, the Voorhes's farm, so called, to be set off and included in Ryers's part, and also the places or farms occupied by the Sparks, Dunn, Bates, and Spalding, to be set off and included in Ryers's, and he to confirm the contracts originally made for the farms in possession of the above-named persons with them and those under whom they claim. In Shepard's part to be set off and included the farms in possession of Gibson, Eng'ish, and Roberts. In the division of said tract, the relative value of said above-mentioned farms, compared with the other parts of the said tract, shall be taken into consideration, so as to form an equal division in quantity and quality in the proportion aforesaid; and the said division shall be made by Emanuel Coryell (and two other persons, in whose place the parties, by a subsequent agreement, substituted Knox and Ferris,) or any two of them, and the expenses of the division to be paid by the parties in proportion to their rights. Now, therefore, the said John Shepard and John P. Ryers do hereby covenant and agree, to and with each other, and to and

In an action for the breach of a covenant contained in an agreement, the plaintiff cannot recover back from the defendant money which he paid him to induce him to enter into the agreement,
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as it is still subsisting and unrescinded, especially where the plaintiff in the same action recovers damages for a breach of the covenant.

The plaintiff and defendant, being joint proprietors of a tract of land, of which the plaintiff had conveyed a part, by deed, with covenant for quiet enjoyment and warranty, agreed to make partition of the tract in such a manner that the part conveyed by the plaintiff should be set off in his portion; and they appointed three persons to make the partition, and covenanted to execute releases to each other. The persons appointed having made the partition, the defendant refused to execute a release: Held, that the plaintiff was not entitled to recover, as

damages, for the breach of the agreement to release, any part of the consideration expressed in the deed, to his grantee, who had never been evicted, the plaintiff's liability being merely contingent; and he can have no claim against the defendant for damages which he may, by possibility, be liable, to his grantee: besides, it is questionable, whether the defendant would not be estopped by the partition, which, though it has not the operation of a conveyance, might be considered in the nature of an award, from the setting up his title against the plaintiff's grantee. (a)

(a) *M'Brice v. Hagan*, 1 *Wendell's Rep.* 326.

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with their respective heirs, &c., to perform, fulfil, and keep, all and singular the agreements on their parts and behalf to be performed, fulfilled and kept; and that they will execute, each to the other, releases, according to the divisions to be made by the above-mentioned persons; and they do hereby to the said performances of the said agreements, bind themselves, *their heirs, &c., each to the other, in the penal sum of 4,000 dollars, firmly by these presents. Sealed, &c."

The plaintiff, also, produced in evidence the award of the three persons appointed to make partition of the *Schoolcraft* location, dated the 13th of *July*, 1811, by which the several lots contained in the location were set off to the parties respectively. It was also proved, that the plaintiff had released to the defendant, in pursuance of the agreement; and that the defendant had acknowledged that *John H. Avery* had released to him, but that the defendant refused to execute a release to the plaintiff.

To establish his claim to damages, the plaintiff proved, (the testimony being objected to, but admitted by the judge,) that he had paid to the defendant 400 dollars, in order to induce him to enter into the agreement. The plaintiff, also, offered in evidence a deed from himself to one *Gibson*, dated in *December*, 1800, the consideration expressed in which was 144 pounds, for the farm in the possession of *Gibson*, mentioned in the agreement, and which, by the partition, was set off to the plaintiff. The deed contained general covenants of quiet enjoyment and warranty, and was offered as evidence of the plaintiff's liability to repay the consideration to *Gibson*, by reason of the defendant's refusal to execute a release. The evidence was objected to on the part of the defendant, but was admitted by the judge, who ruled, that the plaintiff was entitled to recover two thirds of the consideration money mentioned in the deed, with interest from the date. The plaintiff, then, for the same purpose, produced in evidence his deeds to *English* and *Roberts* for their farms, mentioned in the agreement between the parties, both of which contained general covenants for quiet enjoyment and of warranty.

The judge charged the jury, that the plaintiff was entitled to recover as damages, sustained by the defendant's refusal to execute a release, all money that the plaintiff had been obliged to pay, or was liable to pay to the purchasers of the land, and the expenses of the partition; and that, therefore, it would be proper for the jury to allow the plaintiff two thirds of the amount of the consideration money, expressed in the several deeds given in evidence, together with interest from the date of the deeds, and one third of *the expenses of partition and interest thereon, together with the sum of 400 dollars, paid by the plaintiff at the execution of the agreement, and interest on the same. The jury accordingly found for the plaintiff a verdict comprising those sums.

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A motion was made to set aside the verdict, and for a new trial.

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H. Bleecker, for the defendant. 1. It was incumbent on the plaintiff to show, that he had performed, or offered to perform, his part of the agreement. The witness merely says, that his *impressions* were, that the plaintiff tendered a release to the defendant. But the fact ought to have been made out by clear and positive testimony.

2. The plaintiff could not recover damages merely because he might, possibly, at some future day, be sued by the persons to whom he had sold the land. The plaintiff has never been called on to pay. It was not certain that his grantees would ever be evicted. The defendant might have thought proper to release them. The deeds of the plaintiff contained covenants for quiet enjoyment and warranty; but until the grantees are evicted, they can sustain no action against the plaintiff, on his covenants. (2 *Johns. Rep.* 1. 395. 3 *Johns. Rep.* 471. 7 *Johns. Rep.* 258. 376. 8 *Johns. Rep.* 198.) The defendant, therefore, ought not to be compelled to indemnify the plaintiff for what he has not paid, and may never be called to pay.

3. The plaintiff was owner of one third of the land, and the defendant of two thirds, and they agreed to make partition. This agreement not being executed, the parties stand precisely in the same situation as before; and if the plaintiff is called on to refund the money he has received from his grantees, he retains the land; and all that he can be entitled to recover as damages, is six years' interest. (*Caultkins v. Harris*, 9 *Johns. Rep.* 324.)

4. The damages do not necessarily result from the breach of contract stated in the declaration. Unless particularly stated in the declaration, evidence of such damage is inadmissible. (1 *Chitty, Pl.* 332.) Special damages arising from special causes must be specially stated.

5. Suppose the plaintiff, after the agreement, had entered into possession of these farms, according to the partition, would not the defendant have been *estopped* from bringing an action of ejectment? Though an award may not operate to convey land, it may conclude the defendant from contesting the title of the plaintiff. (*Doe v. Rosser*, 3 *East*, 15. *Calhoun's Lessee v. Dunning*, 4 *Dallas*, 120. *Kyd on Awards*, 59.)

6. The plaintiff and defendant are tenants in common. Can one tenant in common maintain an action of ejectment against his co-tenant?

[SPENCER, J. No doubt he may, though no actual ouster proved.] (σ)

(σ) *Oates v. Brydon*, 3 *Burr.* 1896. 12 *Mod.* 657. 7 *Mod.* 39. 1 *Term Rep.* 758. 3 *Wils.* 118.

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7. The deed from the plaintiff to *Gibson* and others ought not to have been received in evidence, to show particular damages: they are not mentioned in the declaration. (1 *Ch.ty*, Pl. 333.)

Collier, contra. Though the plaintiff and defendant were, originally, tenants in common, yet before the agreement about the partition, the plaintiff had conveyed all his right and title, so that, at the time of the agreement, he was no longer a tenant in common with the plaintiff.

The evidence as to the release of the plaintiff was sufficient. Though one of the witnesses spoke of his *impressions*, yet another witness, *Joshua Ferris*, proved the release by the plaintiff, pursuant to the agreement, and that the defendant had acknowledged to him that *Avery* had released to the defendant. The evidence was uncontradicted, and went to the jury, who have passed upon it.

As to the damages, the cases cited are those of bonds of indemnity, or where the question is technically as to the indemnity. They are not analogous to the present case.

It is obviously just, that the plaintiff should be restored to the situation in which he would have stood, had the defendant performed his part of the agreement.

The deeds to *Gibson* and others were sufficiently referred to in the declaration to entitle the plaintiff to offer them in evidence.

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*THOMPSON, Ch. J., delivered the opinion of the Court. The rule of damages by which the recovery in this case was governed, cannot be sanctioned in several particulars. The action is founded upon a covenant entered into by the parties, the object of which was to effect a division of certain lands in which the parties were jointly interested. One item of the plaintiff's claim to damages was 400 dollars, which, it was alleged, he paid to the defendant to induce him to enter into the agreement. This sum could not, in any way, be considered as damages for breach of the agreement. It formed a part of the consideration of the agreement; and as long as that is considered a subsisting contract, the plaintiff can have no claim to recover back the consideration money. If the covenant had been rescinded, or an end put to it, in any manner, without his fault, then the plaintiff might recover back this money: but as long as the covenant is considered in force, he can have no claim to recover back the sum thus paid. The other items allowed as damages are founded on the supposition that the covenant was in full force. The plaintiff could not recover damages to which he might, by possibility, be liable, in consequence of the covenants in his deeds to *Gibson*, *English*, and *Roberts*. These were general covenants of warranty, and for quiet enjoyment. The deeds were for farms, which by the

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covenant were to be set off to *Shepard*, and which have been awarded to him by the persons for that purpose appointed. But these grantees have not been disturbed in their possessions, nor has *Shepard*, in any manner, been made liable for any damages under his covenants. Indeed, it does not appear that his covenants have been broken, as no eviction of his grantees has been shown. His liability is altogether contingent; and he may never be exposed to the payment of the damages he has recovered of the defendant. The plaintiff might, possibly, apply to the Court of Chancery, and compel a specific performance of the defendant's agreement to release his claim to these farms; but as long as he chooses to rest upon his covenant for damages at law, he must show himself damnified, or he can only recover nominal damages. Indeed, it is very questionable whether the defendant ever could set up his title to these farms. The *partition made by the persons appointed for that purpose, might be considered in the nature of an award of arbitrators, which, though it might not have the operation of conveying the land, might estop the defendant from setting up his title to these farms, or disturbing the possessions held under the plaintiff's deeds. (3 *East*, 15. 4 *Dallas*, 20.) A new trial must, therefore, be granted, with costs to abide the event.

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v.
PEET.

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New trial granted.

RICE against PEET.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below against the plaintiff in error, and declared against him in an action for money had and received, on a certain promissory note given by *David Franklin* to the plaintiff below, and upon which the defendant below had received the money; and also alleging that the note was obtained from him, the plaintiff below, by management, when he was insane and of unsound mind. The defendant pleaded the general issue, and that there was another suit pending before the same justice, between the same parties, for the same cause; and also, that the note was received by the defendant below in pledge, on an agreement to exchange farms, to be forfeited unless the agreement was fulfilled, and that the plaintiff below failed in performing his agreement. On the trial,

In an action to recover the amount of a promissory note, delivered by the plaintiff to the defendant, in pursuance of an agreement between them, of which note the defendant had received payment, the plaintiff may show that he was, at the time of making the agreement and delivering the note, insane and incapable of contracting.

An agreement for the exchange of lands is within the statute of frauds, and must be in writing; and therefore, where, on a parol agreement for such exchange, the plaintiff delivered to the defendant the promissory note of a third person, as a pledge, to be forfeited in case of the plaintiff's noncompliance with the agreement, and the defendant received payment of the note, the plaintiff may recover the amount from the defendant, the delivery of the note being without consideration. (a)

(a) *Green v. Green*, 9 Cow. Rep. 46. *Burlingame v. Burlingame*, 7 *Ibid.* 92.

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MYER
v.
FISHER.

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evidence was given of the incapacity of the plaintiff below to contract, at the time the bargain was alleged to have been made. The defendant below proved the pendency of another suit between the same parties, on another note given by one *Parish* to the plaintiff below, and which had been pledged in the *same manner. The jury found a verdict for the plaintiff below, on which judgment was rendered.

Per Curiam. The judgment must be affirmed. Admitting the pendency of another suit by the same plaintiff against the same defendant to have been duly proved, it formed no objection to this action; it was for a distinct matter, and the plaintiff had a right to bring separate suits. Nor was there any legal objection to the plaintiff's showing that this note was obtained from him at a time when he was incapable of making any contract; and the jury have considered that fact as made out by proof. But there is another ground on which the plaintiff had good right to recover the money received by the defendant on that note. It was received by the defendant without consideration; the contract for the exchange of farms was void by the statute of frauds, being by parol only. The judgment must, accordingly, be affirmed.

Judgment affirmed.

MYER against FISHER.

Where a cause, in a justice's Court, is adjourned to a future day, at a certain hour, when the parties attend, and the justice, for his own convenience, and with the consent of the defendant, delays the trial, and when he is ready to try the cause, informs the defendant that he intended to bring it on, who

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voluntarily absents himself, the delay does not amount to a discontinuance, and a judgment rendered against

IN ERROR, on *certiorari* to a justice's Court.

After issue joined in this cause, it was adjourned to a future day, at two o'clock in the afternoon, at which time the parties appeared, and the justice having indispensable business which prevented his attending at the time appointed, the defendant below, who is the plaintiff in error, assented to a delay. When the justice had got through his business, between four and five o'clock, he saw the defendant in the street, and sent word to him and to his attorney, who was at a short distance off, that he was ready to proceed; but neither of them appeared, and the justice proceeded to try the cause, and gave judgment for the plaintiff below.

Per Curiam. The judgment must be affirmed. The consent *of the defendant below to the delay, takes away all ground of complaint. It is evident that he wilfully absented himself, after being apprized that the cause would be called on to trial. The delay here is fully and satisfactorily accounted for; and it

the defendant, on an *ex parte* trial, is not erroneous. (a)

(a) *Baldwin v. Carter*, et not. supra, 496.

the defendant has sustained any injury, it has been occasioned by his own fault or folly, and does not come within the principle which has governed any of the cases, in which it has been held that the cause was out of Court, in consequence of the delay of the trial.

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ABEEL
v.
RADCLIFF

Judgment affirmed.

ABEEL AND ABEEL *against* RADCLIFF.

THIS was an action for the use and occupation of a lot of ground, dwelling-house, and premises, situate in the town of *Catskill*, in the county of *Greene*.

At the trial, it was proved by a witness on the part of the plaintiffs, that there was a dwelling-house and barn on the premises in question, which he hired of the defendant, and had occupied them for two years and upwards, and paid the rent of 180 dollars, exclusive of taxes, of which 150 dollars were paid in cash, and the residue in improvements to the buildings. He testified that this was a high rent, though the premises were valuable on account of their situation, but that without the buildings, the annual value of the lot would not be more than 12 dollars and 25 cents. The premises had been leased by the plaintiffs to *Van Bergen*, by deed dated the 1st *April*, 1793, for the term of ten years, at the annual rent of 14 dollars and 25 cents. It was admitted on the part of the plaintiffs, that they had served the defendant's tenant with a notice to quit. For the other facts in this cause, see the case between the same parties, (13 *Johns. Rep.* 297.) the statement in which, it was consented, should be considered as part of the case in the present suit, except *so far as it relates to the agreement respecting the valuation of the rent.

It was contended, on the part of the plaintiffs, that they were entitled to receive a rent, as well for the lot as the buildings thereon, equal to the sum received by the defendant from his under tenant; and it was admitted, on the part of the defendant, that if such were to be the rule, the plaintiffs were entitled to recover 300 dollars, being the two years' rent; but the defendant contended that he was liable only for the use of the lot, exclusive of the buildings; and it was proved that the lot alone was worth from 10 to 12 dollars. A verdict was taken for the plaintiffs for 300 dollars, which was to be modified in conformity to the rule to be laid down by the Court, as to the amount that the plaintiffs were entitled to recover.

J. V. D. Scott, for the plaintiffs. The Court have clearly decided that the plaintiffs are entitled to this action. (*S. C.*)

Where there is a lease at a certain annual rent, and the tenant holds over, after the expiration of the lease, without any new agreement as to the rent, the law implies that the tenant holds, from year to year, at the original rent.

But if the rent reserved in the lease was merely a ground rent, or for the land, exclusive of the buildings, and the landlord, at the expiration of the term, becomes entitled to the buildings erected by the tenant, as well

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as the land, in that case, a different rule will be adopted, and the annual value of both the land and buildings is the measure of damages. (a)

(a) *Evrtson v. Sawyer*, 2 *Wendell's Rep.* 507. *Bradley v. Covert*, 4 *Cow. Rep.* 349.

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RADCLIFF.

13 *Johns. Rep.* 297.) The only question here is as to the amount of rent to be recovered. By the 31st section of the act relative to rents, (36 sess. ch. 63. i *N. R. L.* 435—445.) (a) where the demise is not by deed, the landlord may recover a satisfaction for the use and occupation. Here the lease having expired, and the defendant holding afterwards under an agreement for a lease, which was void for uncertainty, there is nothing shown, but the mere relation of landlord and tenant between the parties. There being, then, no evidence of any stipulated rent, the plaintiff is entitled to recover a reasonable compensation for the use and occupation.

P. Ruggles, contra, admitted that the only question was, how much the plaintiff was fairly entitled to recover. As the defendant loses all the buildings he has erected on the premises, in justice and equity, he ought not to pay more than the value of the ground rent. Where a tenant continues in possession, after the expiration of a lease, the fair understanding is, that he is to pay rent according to the lease. (*Harding v. Crathorn*, 1 *Esp. N. P. Cas.* 57.)

* 507] In *Hern v. Tomlin*, (*Peake's N. P. Cas.* 192.) where the defendant had entered into possession under an agreement to purchase, and an assurance that the plaintiff had a long term of years, on the faith of which he incurred considerable expenses, Lord *Kenyon* ruled that an action for use and occupation would not lie, as the occupation was not beneficial, but injurious, there being only three years of the term to run. In *Smith v. Stewart* (6 *Johns. Rep.* 46.) where a person entered into possession of land, under a contract for the purchase, which he, afterwards, refused to complete, it was held, that an action of *assumpsit* for the use and occupation would not lie against him; and that the plaintiff's remedy was by an action of ejectment to recover the *mesne profits*.

SPENCER, J. The right of the plaintiffs to recover, as for the use and occupation of the premises, was settled by the decision of this Court between the same parties, (13 *Johns. Rep.* 297.) under the same state of facts. The plaintiffs claim the real annual value of the premises; the defendant insists that they are entitled to recover only the rent stipulated in the original lease for ten years, which is 11 dollars and 25 cents, or, at most, the annual value of the lot, without the buildings.

The principle is, undoubtedly, a sound one, that where a tenant holds over, without any new stipulation between the parties, an implication arises that there is a tacit consent on both sides, that the tenant shall hold, from year to year, at the former or first rent.

This case, however, stands on different ground; and the

facts disclosed show that the principle contended for does not apply. The parties have agreed to the facts as stated in the case in 13 *Johns. Rep.*; and it will be seen, by reference to those facts, that the rent reserved by the original lease, was exclusively reserved upon the lot, without regard to the buildings. Since the expiration of the original lease, and the subsequent events, the plaintiffs have a legal title to the buildings, as well as to the lot. The former rent accruing from the lot alone, cannot be the criterion in ascertaining the value of the rent of the house and lot; and the law raises no implied agreement in such a case, that the old rent shall be the measure of damages. To test the soundness of the rule insisted on for the defendant, let us suppose that a landlord *lets a vacant lot for a year, at a stipulated price, and, during the term, erects a valuable house on the lot, with the assent of the tenant; nothing is said as to the second year, but the tenant enjoys the lot and the house; would the landlord's right to rent be restricted to the amount he was to receive during the first year, for the lot? We think it would not, but that he might recover the actual value. No substantial difference is perceived between the case put and the present. The rent agreed upon between the parties was for the naked lot; and when, by operation of law, the plaintiffs have acquired a title to the house also, a different rule must be established; for a new state of things has arisen between the parties, repelling the presumption that they intended that the tenant was to hold at the old rent. I am, therefore, of opinion, that the plaintiffs are entitled to judgment for three hundred dollars, for which the verdict was taken by consent.

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VAN NESS, J., and YATES, J., concurred.

THOMPSON, Ch. J. It is a settled principle that the action for use and occupation will lie only where there is an express or implied contract under which the possession and enjoyment of the land has been held. In the case of *Smith v. Stewart*, (6 *Johns. Rep.* 48.) it is said by this Court, that the relation of landlord and tenant must exist, founded on some agreement creating that relation. In the case before us, this relation originated by express contract, and at a specified rent; and the simple question arising out of the case is, where such a tenant holds over, after the expiration of his lease, what is the implied contract as to the amount of rent? Upon this point, I have supposed no doubt could exist, that, in the absence of any express agreement, the implication of law would be, that each party assented to a continuance of the tenancy, at the same rent. If this is the general principle, I see nothing in the present case which should prevent the application of that principle.

There is, certainly, nothing in the opinion of the Court, in the

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former case between the same parties, (13 *Johns. Rep.* 297.) which can, in any measure, take it out of the general *rule. So far as any existing equities between the parties ought to influence the decision, that case is decidedly against the claim now set up by the plaintiffs. For although we considered the covenant relative to the renewal of the lease and payment for improvements as void, for uncertainty, yet it is expressly said, that the object of the parties probably was, that the lessee should have a new lease, for such a term as would reimburse, or indemnify him, for his expenses in the erection of a house and barn, in case the plaintiffs did not elect to pay for them, at the expiration of the former lease. The plaintiffs not having paid for these buildings, nor given a new lease, are now seeking to deprive the defendant of any benefit from the improvements made, at all events, under a belief and expectation that he was to receive a compensation for them. This must strike every person as being highly inequitable and unjust. It is no answer to say, that the plaintiffs may bring an ejectment, and recover possession of the land, and in that way deprive the defendant of his improvements. If they choose in that way to put an end to the tenancy, they may probably do it. But if they elect to consider the defendant a tenant, and bring an action that can only be supported on the supposition that the relation of landlord and tenant still exists, the defendant is entitled to the full benefit of the rule so explicitly laid down by Lord *Kenyon*, in the case of *Doe v. Bell*; (5 *Term Rep.* 471.) that where a tenant holds over, after the expiration of his term, without having entered into any new contract, he holds upon the former terms. I am, accordingly, of opinion, that the amount of recovery ought to be regulated by the rent reserved in the former, or first lease.

PLATT, J., was of the same opinion.

Sed per Curiam,

Judgment for the plaintiffs, for three hundred dollars.

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*BATES against SUTHERLAND.

Where a turnpike act exempts from the payment of toll persons going to or returning from mill with grain or flour for their family use, the exemption does not apply to a wagon going through the turnpike gate loaded with other articles, and some grain or flour.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action of debt, for 25 dollars, against the plaintiff in error, in the Court below. The action was for the recovery of penalties from the defendant be-

low for taking toll of the plaintiff below, when going and returning from mill, at gate No. 4, on the *Dutchess* turnpike, in *April*, 1817. It appeared that the plaintiff below, with two wagons, passed through the gate with grist, on his way to mill; and that the wagons returned with shingles and grist on them. The toll was not paid when they first went through the gate, but it was afterwards demanded and paid, though it did not appear whether it was paid for going to mill or not. The sum paid was 62 and a half cents. A verdict and judgment were rendered for the plaintiff below, for 3 dollars and 25 cents.

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v.
SUTHERLAND

Per Curiam. The judgment must be reversed. The evidence contained in the return does not prove that the toll-gatherer claimed or demanded toll not authorized by law; and it is difficult to discover on what ground the plaintiff below sought to charge the defendant. The summons appears to be for a penalty of 25 dollars; but it is not stated, either in the summons or declaration, under what statute the claim is founded. No such penalty is given in the act establishing the *Dutchess* turnpike company, passed *April* 5th, 1802. There is a penalty of 2 dollars, given against the toll-gatherer who shall demand and receive more toll than is allowed by the law. The verdict was probably founded on that part of the act, and on the consideration that two penalties had been incurred; yet this could not make the verdict 4 dollars and 25 cents. If the action is for the recovery of a penalty, the proof should show satisfactorily that a penalty had been incurred, which it certainly does not. Under the act incorporating this company, persons going to, and returning from, mill with grain or flour, for their family use, are exempted *from paying toll. But it is very evident that the plaintiff, when returning from the mill with shingles in his wagon, did not come within this exemption, although he might also have had grist. This would be sanctioning a fraud upon the act, and would be contrary to what has been frequently held by this Court to be the true construction of these and similar exemptions in turnpike acts. (7 *Johns. Rep.* 185. 9 *Johns. Rep.* 356.) The judgment must, accordingly, be reversed

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Judgment reversed.

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SANDS

v.

GELSTON.

Where the defendant admits that he has received the money, which the plaintiff claims, but denies the validity of the claim, such acknowledgment is not evidence of a new promise, so as to take the case out of the statute of limitations. (a)

Where the defendant says, that if the plaintiff has a claim, either in law or equity, he will compromise the business, or submit it to arbitration, but at the same time, denies that he has any claim either at law or equity, this is not

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sufficient to take the case out of the statute.

SANDS against GELSTON.

THIS was an action of *assumpsit*. The defendant pleaded *non assumpsit*, and *actio non accrevit infra sex annos*. The plaintiff replied, that the action did accrue within six years. The cause was tried before Mr. J. Spencer, at the New-York sittings, in April, 1817.

The plaintiff was formerly collector of the customs of the port of New-York, was removed in July, 1801, and was succeeded by the defendant. The plaintiff had, previously to his removal from office, caused two vessels, the ship *Huron*, and the schooner *Two Friends*, to be seized for a violation of the registry act of the United States; and after the plaintiff's removal they were condemned, and the amount of the forfeitures was paid over to the defendant. The plaintiff claimed one third of the moiety of these forfeitures.

At the time of his removal, the plaintiff delivered over to the defendant a number of bonds which had been taken for duties, amounting to 3,254,773 dollars and 24 cents. Of these bonds, 3,113,101 dollars and 42 cents were paid to the defendant, on or before the 30th of June, 1802, at which time an act of Congress allowing the collector a salary, instead of a commission of one fourth per cent., formerly received on moneys collected by him, went into operation. The plaintiff, in July and September, 1801, paid over to the defendant large sums in cash, being money received by him for duties, amounting to 52,168 dollars and 93 cents, without making any deduction for commissions. The plaintiff claimed, in this action, one fourth per cent. commission, on the amount of the bonds which he had delivered to the defendant, and which the defendant had collected prior to the 30th of June, 1802, and also a commission of one fourth per cent. on the money paid over by him to the defendant.

At the trial, several letters between the parties were read. On the 23d of March, 1816, the plaintiff wrote to the defendant respecting his claim for forfeitures, proposing a reference; and the defendant, in his answer of the 29th of the same month, refers to a compromise that had been made between the executors of Mr. Osgood, formerly naval officer, and Mr. Ferguson, his successor, and Mr. Schenck, formerly surveyor, and Mr. Haff, his successor, by which the proceeds of condemnations prior to the death of Mr. Osgood, and the removal of Mr. Schenck, were paid to Osgood's executors and Schenck, and the proceeds of subsequent condemnations were paid to Ferguson and Haff. The defendant then adds, "If the compromise above stated was to be taken for a rule, you will perceive that you have no claim.

(a) Vide *Denny v. Smart*, 3 Wendell's Rep. 135. *Purdy v. Austin*, *Ibid.* 187. *Bradley v. Field*, 3 *Ibid.* 272. *Clark v. Dutcher*, 9 Cow. Rep. 674. *Murray v. Coater*, 4 Cow. Rep. 617. *Bayar v. Wilcocks*, 3 Cow. Rep. 159.

But to go further, as you ask my opinion, which I now give you, and corroborated by what I consider good authority, *Mr. Ferguson* and *Mr. Hoff*, were entitled in law to all the forfeitures they have given up by compromise. Under these circumstances, I must decline both the trouble and expense of a reference."

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GELSTON.

In a previous letter, of *May 30th*, 1814, the plaintiff wrote to the defendant on the subject of his claim for commissions; to which the defendant, on the 3d of *June*, answered, "I did suppose that in the frequent conversations upon the subject you mention, I had been sufficiently explicit. I never had but one opinion, which is, that the law never contemplated or intended a payment from me to you. I am yet of that opinion. If I had thought otherwise, I certainly would not have delayed it to the present time."

Samuel Stevens, a witness on the part of the plaintiff, testified that in 1814 and 1815, and, perhaps, in the beginning of 1816, he had, at the request of the plaintiff, several *conversations with the defendant, in relation to the plaintiff's claims, which the witness offered to compromise, or submit to reference, and that in these conversations the defendant admitted, that he had received the commissions, and that they had not been paid over to the plaintiff, and also, the receipt of the forfeitures: that the defendant frequently said, that if the plaintiff had a claim in law or equity for the forfeitures or commissions, he would submit it to reference, or compromise the business; but that, in his opinion, the plaintiff had no claim, in law or equity, for either; and that, if he had, he, the defendant, would not have left the business so long unsettled: that the plaintiff had frequently written and spoken to him on the subject, but he considered that he was not entitled to the forfeitures or the commissions; and the defendant added, that if the witness would convince him that the plaintiff was entitled, in law or equity, to the forfeitures or commissions, he would submit it. The witness further stated, that in one of their conversations the defendant said, that the plaintiff had been troubling him a long time on the subject of these claims, or used words to that effect. The witness also produced a letter, which he had shown the defendant. This letter was from the comptroller of the treasury, at *Washington*, to the plaintiff. On presenting this letter to the defendant, the witness claimed of him the performance of what the witness considered a conditional agreement to submit the matter to a reference; to which the defendant answered, that he had only told the witness, that he would submit the claim, if in his, the defendant's, opinion, the plaintiff had an equitable claim, and that his opinion was not altered by the opinion of the comptroller.

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A verdict was taken for the plaintiff, for the sum of 20,349 dollars and 50 cents, subject to the opinion of the Court, on the questions, whether the plaintiff was entitled to the forfeitures and commissions, and to what extent; whether there had

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been sufficient evidence to take the case out of the statute of limitations, and for what period of time the plaintiff was entitled to recover interest.

*The case was argued by *Hoffman and Wells*, for the plaintiff, and by *T. A. Emmet and Baldwin*, for the defendant.

As the cause was decided solely on the plea of the statute of limitations, it is unnecessary to state the arguments of the counsel on the other points in the cause, which involved the merits of the plaintiff's claim.

For the plaintiff, it was contended that there had been a sufficient acknowledgment, on the part of the defendant, to take the case out of the statute of limitations. If the jury, from any evidence before them, could infer a promise, the statute would not apply. The slightest admission, or acknowledgment, is sufficient for the purpose. Originally, there could be no express promise; but the law raises the promise, on the fact of the defendant having received the money. It is not like reviving an express promise by a new promise. In none of the conversations with the defendant does he put himself on the statute, or seek its protection; but insists on his legal right to retain the money. Since the statute of limitations was passed, it has been the object of Courts to apply it, according to its great and beneficial purposes; not to shelter fraud, or encourage injustice. After the lapse of six years, the law presumes the debt to be paid, and gives that presumption to the party as a defence. But the Courts have considered the slightest acknowledgment of the existence of the debt sufficient to go to a jury. (2 Burr. 1099.) Thus, such expressions as, "Prove it, and I will pay you;" (1 Salk. 29.) "I am ready to account, but nothing is due to you." (Cowp. 548.) have been held sufficient to take the case out of the statute. So here the defendant admitted that he had received the money, but insisted, that he was legally entitled to it. It is saying in substance, "It is true I have got the money which you claim; prove that it belongs to you, and I will pay it." In *Lloyd v. Maund*, (2 Term Rep. 760.) a letter written by the defendant to the plaintiff's attorney, who had brought the suit, couched in ambiguous terms, neither admitting nor denying the debt, was left to the jury, to consider whether it did not amount to an acknowledgment of the debt, so as to take it out of the statute. So, in *Rucker v. Hannay*, (4 East's Rep. 60. in a note,) the defendant, in an affidavit, on application to the Court for leave to plead the statute, stated, that "since the bill of exchange (on which the action was brought) became due, (which was more than six years before,) no demand for payment had been made of him," which was left to the jury, who found a verdict for the plaintiff, which the Court refused to set aside.

The doctrine is put on its true ground, by this Court, in *Sluby v. Champlin*, (4 Johns. Rep. 461.) that where enough

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as shown to repel the legal presumption of payment, arising from lapse of time, it takes the case out of the statute. That case, also, obviates another objection, that the new promise must go to the whole demand. In *Dean v. Pitts*, (10 Johns. Rep. 35.) the defendant admitted that he made the notes on which the action was brought, but said they had been paid; that he had sent the money to R., and supposed he had paid the plaintiff; that he would not plead the statute of limitations, unless the money had been paid; and he thought he could make that appear. The Court held this to be a sufficient acknowledgment to take the case out of the statute. So, in *Mosher v. Hubbard*, (13 Johns. Rep. 510.) the defendant, on being called on to pay an order, after the lapse of six years, said, that he did not recollect that he had paid it, but would examine his papers; he would write to the witness about it; but did not. The Court held this to be such an admission as would take the case out of the statute. In *Danforth v. Culver*, (14 Johns. Rep. 146.) the defendant, on being called upon, directly put himself on the statute of limitations, as his defence; and in *Lawrence v. Hopkins*, (13 Johns. Rep. 288.) the defendant denied the legality of the demand, and said it was an unjust debt. In the late case of *Johnson v. Beardslee*,† the promise of one joint debtor to pay a debt barred by the statute, was held sufficient to take the case out of the statute; and the principle was applied to an acknowledgment by two of the several defendants, in an action against them, as heirs and devisees of a deceased debtor, and which was held sufficient to charge all of them.

Again; there is a distinction between an express and implied contract, which is recognized in the case of *Pease v. Howard*. (14 Johns. Rep. 479.) Whenever all the facts from which the law raises the implied promise are admitted by the defendant, the statute does not apply. This is a case in which the plaintiff must recover on the implied promise. May not an implied promise be revived without an express promise to pay? In *King v. Riddle*, (7 Cranch's Rep. 168.) where a writing, signed and sealed by the defendant, reciting that the plaintiff and others had become his sureties for a debt due J. F., and having become accountable, had paid a debt, and he, the defendant, being desirous to secure them, &c., assigned to T. V., one of the sureties, certain bonds, &c. This recital was held to take the case out of the statute. (2 Saund. 64. a. note.)

For the defendant, it was argued, that nothing had been said or done by the defendant amounting to such an acknowledgment or promise as would take the case out of the statute of limitation. The plaintiff is not entitled to the favor shown by the law to a vigilant creditor. From 1801 to 1813, he was perfectly silent; he slumbered on his rights, and even in his slumbers did not dream of any claim. He again slumbered, until he heard,

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in 1816, that the Supreme Court of the *United States* had decided, that the representatives of a deceased collector were entitled to a share of the forfeitures incurred in his lifetime. (*Jones v. Shore*, 1 *Wheat. Rep.* 462.)

A distinction has been raised between an express and implied promise, as to the operation of the statute. This distinction seems to have been first suggested in *Clarke v. Bradshaw*, (3 *Esp. N. P. Rep.* 155.) but is not supported by any adjudged case. Where the law raises an implied promise, it stands *pari ratione* with an express contract. The statute is to be applied in the same manner, whether the *assumpsit* be express or implied. Why is an action of *assumpsit* within the statute? Because it is an action on the case. Then it must be tested as if it were an action on the case. By the argument of the plaintiff's counsel, facts, or the acknowledgment of facts, must be proved, and then the law raises the implied promise from the facts; but if there must be an *acknowledgment* of facts for the purpose of raising the implied promise, there can be no occasion to resort to a proof of facts. It is by proof that the facts are to be established, and from the silence of the defendant, his admission is to be inferred. This would be a perversion of the statute. The policy of the statute is to repress and put an end to stale demands; not because the debt is supposed to be paid. The scale of limitations for different actions is graduated altogether on principles of public policy. The Courts have gone unwarrantable lengths to take cases out of the operation of the statute, and seem now disposed to tread back their steps, and to look at the real object, the sound and beneficial policy of the statute. The true doctrine is now understood to be, that there must be an actual or express promise, or a clear acknowledgment of the debt being due, from which a promise to pay is implied, not from the original contract which is extinguished, and barred by the statute. Thus, in *Clementson v. Williams*, (8 *Cranch's Rep.* 72.) where the proof was, that an account stated was presented to one of two partners, who said it was due, but supposed it had been paid by his partner, but that he had not paid it himself, Ch. J. *Marshall* held, that the acknowledgment went only to the original justice of the account, and was not sufficient proof that the debt still remained due, so as to take the case out of the statute: that to have that effect, the acknowledgment must go to the fact, that the debt is still due. *Sergeant Williams*, (2 *Saund. Rep.* 64. a. note.) after stating that it was formerly held, that a promise to pay the debt was alone sufficient to take it out of the statute, (2 *Vent.* 152. 6 *Mod.* 309, 310. *Carth.* 471. 2 *Show.* 126.) but that now the distinction between a promise to pay and a bare acknowledgment was no longer regarded, the latter being deemed sufficient to take the case out of the statute, expresses his regret at the doctrine which had crept into the Courts; and he adds, that "it might have been as well, if the letter of the statute had

been strictly adhered to: it is an extremely beneficial one, on which, it has been observed, the security of all men depend, and is, therefore, to be favored; (2 *Sa'k.* 421, 422.) and though it will, now and then, prevent a man from recovering an honest debt, yet it is his own fault that he has postponed his action so long; *beside which, the permitting of evidence of promises and acknowledgments within the six years, seems to be a dangerous inlet to perjury." The case of *Lawrence v. Hopkins*, (13 *Johns. Rep.* 238.) where there was an offer to compromise, which was rejected, the defendant declaring that the debt was unjust, is a strong case to show that the Court requires an admission of the debt being due to take the case out of the statute. This case, and that of *Jones v. Shore*, if their principles are adhered to, must put a stop to any further attempts to fritter away the statute.

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SPENCER, J., delivered the opinion of the Court. Being of the opinion that the plaintiff has failed in maintaining the issue, that the defendant has assumed and promised to pay any part of the demand within six years, it is unnecessary to consider whether the plaintiff once had a legal demand or not. To take this case out of the statute, the plaintiff relies on the defendant's letters, written in answer to letters from him, and on the admissions made to Mr. *Stevens*. The defendant admits the receipt of the collector's portion of the forfeitures arising from the condemnation and sale of the *Two Friends* and the *Huron*, vessels seized and libelled before the plaintiff was superseded in his office. The proof is very satisfactory, that the defendant received the commissions on bonds taken by the plaintiff whilst in office; but the defendant constantly asserted a right to retain what he had received, on his construction of the law. *Stevens's* evidence proves the defendant's admission of the receipt of the moneys claimed, and that the same had not been paid over to the plaintiff; and that the defendant said, that if the plaintiffs had a claim, in law or equity, for the forfeitures, or commissions, he would submit it to a reference, or he would compromise the business; and that, in his opinion, the plaintiff had no claim, in law or equity, for the commissions or forfeitures; and that if he had, he, the defendant, would not have left the business so long unsettled. That the plaintiff had frequently written and spoken to him on the subject, but he considered that he was not entitled to the forfeiture, or the commissions; but if the witness would convince him, that the plaintiff was entitled, in law or equity, *to the forfeitures or commissions, he would submit it.

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This is the substance and amount of the confessions relied on to take the case out of the operation of the statute of limitations. Courts of law seem to have been convinced, that the construction which has, sometimes, been adopted, to get rid of the operation of the statute, has been carried too far; and

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hence, a disposition has been evinced to put a reasonable interpretation upon the language of the party; an interpretation that shall be consonant to the meaning and intention of the speaker.

The statute of limitations is the law of the land, and, as has been frequently observed, was intended as a shield against stale and dormant demands, under the benign supposition, that the party may have lost the evidence necessary to his defence, by the lapse of time. I never could see the difference as regards the revival of a debt, between one barred by the statute of limitations, and one from which the debtor had been discharged under the bankrupt or insolvent laws. The remedy is equally gone in both cases. The statute of limitations requires all actions on contract to be commenced within six years next after the cause of such action accrued, and not after. The remedy being suspended after six years, there yet exists a moral duty, on the part of the debtor, to pay the debt; and, accordingly, a promise to pay a debt not extinguished, but as to which the remedy is lost, is a valid promise, and may be enforced on the ground of the pre-existing moral duty. There is, then, no substantial difference between a debt barred by the statute of limitations, and a debt from the payment of which the debtor is exonerated by a discharge under a bankrupt or insolvent act. Both of them rest on the same principle with a debt contracted by an infant not for necessities; yet it is singular, that in neither of the latter cases will the bare acknowledgment, that the debt once existed, and has not been paid, support an action; an express promise to pay being necessary.

I mention this merely to show, that in the single case of a debt barred by the statute of limitations, Courts of law have given a construction which would apply, with equal propriety, to the other cases, and yet have restricted the rule to the one case, as though the statute of limitations was an odious statute, and to be gotten rid of by construction.

I am bound by authority to consider the acknowledgment of the existence of a debt within six years before the suit was brought, as evidence of a promise to pay the debt. But I insist, that if, at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, then it will not be evidence of a promise sufficient to revive the debt, and take it out of the statute. In consonance with this distinction, I take it, the cases of *Danforth v. Culver*, (11 Johns. Rep. 146.) and *Lawrence v. Hopkins*, (13 Johns. Rep. 268.) were decided in this Court. In the first case, we held, that although the defendant acknowledged the execution of the notes, but insisting that they were outlawed, and that he meant to avail himself of the statute, no new promise could be inferred without violating the truth of the case. In the other case, the defendant was sued as one of the makers of a joint and several promissory

note, the statute of limitations was pleaded, and it appeared in evidence, that the defendant stated he had lately been sued on a contract made with *Whiting*, (the payer of the note,) and that by the terms of the contract, he had never considered himself bound to pay any thing, and that his counsel advised him that the contract could not be enforced at law. We held the evidence insufficient to take the case out of the statute; that there was neither an express nor an implied promise to pay the debt; on the contrary, that the defendant uniformly considered the demand as unjust from the beginning, and that he was under no obligation to pay it. That to infer a promise to pay, in direct opposition to the defendant's denial of the justice and fairness of the debt, would be trifling with the statute.

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We, certainly, did not mean to overrule these cases in *Mosher v. Hubbard*. (13 Johns. Rep. 512.) The facts in that case were sufficient to be submitted to a jury, and for them to presume, that the defendant not only admitted that the debt was not paid, but that he recognized its existence, as a debt due from him within six years. In the case of *Johnson v. Beardslee* and others, we recognize the law to be, that the acknowledgment of a debt is evidence sufficient for a jury to presume a new promise; and we add, that we did not intimate, in *Danforth v. Culver*, that an acknowledgment of the debt would not have been sufficient, unaccompanied with a protestation against paying it.

† Ante, p. 4.

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To come back to this case; the whole amount of the defendant's admission is this, that the plaintiff had never received what he claimed as a debt; and that, if the defendant believed he had a claim in law, or equity, he would submit the matter to reference, or compromise it; but that, in his opinion, the plaintiff had no such claim; and that he was not entitled to it in law or equity, and, therefore, he would neither submit, nor compromise it.

It would be doing violence to this admission, to say, that there is evidence from which a promise may be inferred, to pay a demand, the justice and equity of which, as well as the defendant's liability to pay it, is utterly denied.

I will briefly review some decisions, which appear to me to place this question in a very clear light. I am not called upon to reconcile all the cases upon this subject. My object is, as far as is possible, to rescue the statute from constructions which go to overthrow it, and to endeavor to place this subject upon rational grounds.

In the case of *Clementson v. Williams*, (8 Cranch, 72.) Ch. J. Marshall says, "Decisions on the statute of limitations had gone full as far as they ought, and the Court was not inclined to extend them in this case; he says, "there is no promise, conditional or unconditional, but a simple acknowledgment;" "the statute," he adds, "was not enacted to protect persons

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from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost; it is not then sufficient to take the case out of the act, that the claim should be proved, or acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due."

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In *Brown v. Campbell*, (1 *Sergeant and Rawle*, 179.) Ch. J. *Tilghman* says, "But I can never agree that a letter which denies that the defendant ever was liable to the plaintiff's demand, will avoid the act of limitations, merely because *it is not denied that payment has not been made." In *Rowcroft v. Lomas*, (4 *Maule and Selwyn*, 457.) the action was for money lent, and the statute was pleaded; the plaintiff gave in evidence the defendant's accountable receipt, for 80 pounds, to account for on demand, and proved, that in 1814 the receipt was shown to the defendant, and he was asked if he knew any thing of it; he said he knew all about it; that it was not worth a penny, and he would never pay it. He admitted his signature, and that he never had paid it, and said he never would, and added, besides, it is out of date, and no law should make him pay it. Lord *Ellenborough* held, that the effect of the receipt was destroyed by the lapse of six years; and something more must be proved than the bare acknowledgment by the defendant that the thing is unsatisfied, to give effect to that which is, *per se*, destroyed. He adds, "The cases, indeed, have determined that a debt, the existence of which is extinct, through lapse of time, may be revived by an acknowledgment that it is unsatisfied; but there must first be some acknowledgment that it ever existed."

It is not correct reasoning to contend, that if the defendant admits that the demand made upon him has never been satisfied, that therefore he has revived the debt, and waived the protection of the statute, when, in the same breath, he insists, that the demand is illegal and inequitable. Though, indeed, the defendant may admit, that what the plaintiff claims as a debt has never been paid, if he protests against his liability, it would be an outrage on common sense to infer a promise to pay, in the face of his denial of his liability to pay. On these principles I rest my opinion, that the defendant is entitled to judgment; and such is the opinion of the Court.

Judgment for the defendant. (a)

(a) In an action against the drawer of a foreign bill of exchange, the evidence to take the case out of the statute was, that the defendant said, "If you had presented the protest the same as the rest, it would have been paid; I had their funds in the acceptor's hands." Lord *Ellenborough* was of opinion, that as this was a qualified admission, in which the defendant resisted payment, on an objection which would have exempted him from payment, the law would not, under the circumstances, imply a new promise. (*De La Torre v. Barclay and Selkeld*, *Starkie, N. P. Rep.* 7.)

***SALTUS and others against THE UNITED INSURANCE COMPANY.**

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THIS was an action of *assumpsit* upon a policy of insurance, dated the 8th of *May*, 1812, underwritten by the defendants, on account of the plaintiffs, on the cargo of the *American brig Syren*, Cobb, master, from the vicinity of *Sandy Hook*, to her port of discharge in *Sweden* or *Russia*, with liberty to call and wait at *Gothenburgh* for orders. In case of capture or detention, the insured stipulate not to abandon in less than six months after advice thereof at the office of the defendants, or until after condemnation; and the defendants assumed the risks usually enumerated in the printed policies used by the insurance companies in the city of *New-York*. The cause was tried before Mr. J. Yates, at the *New-York* sittings, in *November*, 1816.

The cargo of the brig *Syren* was taken on board at the *Spanish Main*, from whence she proceeded towards *New-York*, and having arrived off *Sandy Hook*, was there detained, by the direction of the plaintiffs, to avoid the operation of the embargo then existing, for some days, after which she commenced the voyage insured, and on the 14th of *July*, 1812, arrived in *Wingo Sound*, near *Gothenburgh*. She remained at anchor in *Wingo Sound* until the 24th of *July*, on which day the master received intelligence of the late war between this country and *Great Britain*. To avoid *British* capture, the master took a pilot on board, and immediately proceeded for the town of *Gothenburgh*, as a place of safety, where he arrived on the 26th of *July*; the vessel having in the mean time struck on a rock, her cargo was necessarily taken out. In consequence of this accident, repairs were required, and the vessel was again ready for sea, and her cargo reloaded, in *September*; but it was impossible for her to pursue her voyage to *St. Petersburg*, without the certainty of capture. The *Baltic* was thronged with *British* cruisers: several were stationed in *Wingo Sound*, one or more of which were always in sight from *Gothenburgh*, and the vessel must have attempted to pass them, to get to *sea. The voyage, in consequence, was abandoned in *April*, 1813, the vessel sold, and the cargo stored.

On the 30th of *April*, 1813, the plaintiffs wrote to the defendants, informing them that "the vessel, with the cargo on board, was at *Gothenburgh*, and there restrained by ships of the enemy, which continually blockaded the port of *Gothenburgh*, and prevented her proceeding on the voyage insured;" and also offering to abandon. On the 24th of *March*, 1814, the plaintiffs abandoned the cargo to the defendants, and claimed for a total loss. The requisite preliminary proofs were exhibited

Where a vessel, in the prosecution of the voyage insured, puts into a port, at which she is permitted by the policy to stop, and whilst there, the place is closely invested by the cruisers of the enemy of the country to which she belongs, so that if she attempted to escape, she would inevitably be captured, this is a restraint of princes, or of men of war, within the risks enumerated in the policy, and the insured may break up the voyage, and abandon for a total loss, although there is no direct application of physical force to the subject; and such abandonment is not liable to the objection that it is made *quia timet*. (a)

If, after the commencement of the voyage insured, a war breaks out between the coun-

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try to which the property belongs, and a foreign country, the policy is not vacated, and the insurers are liable for a loss arising out of the state of war.

(a) Vide *King v. Del. Ins. Co.* 6 *Cranch* 71.

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A verdict was taken for the plaintiffs, by consent, subject to the opinion of the Court on a case, which either party was at liberty to turn into a special verdict, or bill of exceptions.

Colden, for the plaintiffs, contended, 1. That the impracticability of pursuing the voyage, in this case, after war was known, was a justifiable cause of breaking up the voyage, and of abandonment, on that ground, for a total loss. It was true, he said, that there were cases in which it had been decided, that the fear of capture would not justify an abandonment; yet it was admitted, in those cases, that if there was such a physical force present as rendered the capture certain, in case the assured attempted to proceed or encounter the peril, he might break up the voyage and abandon. Thus in *Schmidt v. The United Ins. Co.* (1 *Johns. Rep.* 249.) the actual blockade of the port of destination was held to be a sufficient reason for breaking up the voyage. Though the Court, in the case of *Craig v. The United Ins. Co.* (6 *Johns. Rep.* 252.) decided, that the insured could not abandon from fear of capture, or *quia timet*, where the danger is remote or contingent, yet they recognize the principle that where there is a moral certainty of capture, it will justify the assured in breaking up the voyage. *Kent*, Ch. J., in delivering the opinion of the Court in that case, in which all the authorities are fully examined, says, "If the port of *B.* had been absolutely interdicted, so that the prosecution of the voyage to a conclusion had become impracticable, or been attended with a moral certainty of seizure and loss, I should have deemed it equivalent to actual restraint, to the existence of a *vis major* breaking up the voyage." Now, it is a fact in the present *case, that the *Syren* could not have pursued her voyage to *St. Petersburg*, without the certainty of capture.

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2. The sale of the vessel at *G.*, and leaving the cargo in the hands of the agent of the owners, was no waiver of the right to abandon. (1 *Caines's Rep.* 292. 6 *Johns. Rep.* 310. 9 *Johns. Rep.* 1.)

3. The reason assigned for making the abandonment was the true one: the restraint of the enemy by a continual blockade of the port.

4. If the Court should be of opinion that the plaintiffs cannot recover for a total loss, they will be entitled to a return of premium, with interest, according to the terms of the policy, the risk having ended at *Göthenburgh*.

S. Jones, jun., and *Wells*, contra. This is the first attempt to recover on a policy of insurance for total loss, on the ground that the intervention of war, and the consequent probability of capture, is a sufficient cause of abandonment, without any attempt on the part of the insured to proceed on the voyage. No doubt, the war greatly increased the risk; but that is one of the perils insured against. Such a fact may justify a deviation or

delay, not a total abandonment of the voyage. The notice of abandonment is on the ground of a *blockade* of the port. The insured, in making his abandonment, must assign the true cause. He cannot avail himself of any other cause, or of any subsequent event. (*Suydam v. Mar. Ins. Co.* 1 *Johns. Rep.* 181. S. C. 2 *Johns. R. p.* 138.) If the plaintiffs have not made out a case to entitle them to recover for a total loss, neither have they shown sufficient to recover for a partial loss.

But we insist that there was no justifiable cause of abandonment. In *Oiver v. The Maryland Ins. Co.* (7 *Cranch's Rep.* 487.) *Marshall*, Ch. J., in delivering the opinion of the Supreme Court of the *United States*, speaking of the danger that would justify delay, says, "It must not be a mere general danger, indefinite in its application and locality. If it were so, in time of war, any delay, however long, in a port, would become excusable; for there would always be danger of capture from the enemy's cruisers. Nor is it sufficient that the danger should be extraordinary; for then *any considerable increase of the general risk would authorize a similar delay. The danger, therefore, must be obvious and immediate, in reference to the situation of the ship at the particular time. It must be such as is then directly applied to the interruption of the voyage, and imminent; not such as is merely distant, contingent, and indefinite." Instead of going into *Gothenburgh* as soon as the captain heard of the war, he ought to have proceeded to *St. Petersburg*. Is the increase of the risk, by the intervention of war, a justifiable cause of abandonment in any case? There is nothing of the kind in the policy. The term 'restraints of princes,' does not embrace the case. It applies to the restraint of a neutral. A belligerent does not restrain, but captures his enemy. *Blockades* and *embargoes* laid by belligerents on neutrals, are restraints by the authority of the law of nations. The neutral has no right to resist such a restraint, but is bound to submit to the force: to resist would be an unlawful act, and subject his property to confiscation. Being thus lawfully hindered from prosecuting his voyage, he may abandon it, and call on the insurers for his indemnity. A belligerent owes no submission to the force of his enemy; but it is his right and his duty to resist or evade it, to the utmost of his power. If an *enemy* happens to be in possession of the port of destination, or blockades it, it will not justify an abandonment of the voyage: it only excuses a deviation. This principle has been settled in the *English Courts*. (*Hadkinson v. Robinson*, 3 *Bos. & Pull.* 388. 392. *Lubbock v. Rowcroft*, 5 *Esp. N. P. Rep.* 50.) The assured are bound to go on, because they may resist or evade a hostile force; but as it is contrary to the duty of a neutral to resist a belligerent restraint, exercised under the law of nations, he cannot, therefore, be asked or required to proceed. The principle laid down in *Lubbock v. Rowcroft*, has since been frequently recognized. *Blackenhagen v. London Ass. Co.*, *Park*, 6th ed. 226. 1

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Camp. N. P. Rep. 450. *Foster v. Christie*, 11 *East*, 205.) In order to bring a loss within the policy, the peril insured against must act directly, and not collaterally, on the thing insured. In the case of *Craig v. The United Ins. Co.*, *Kent*, Ch. J., alludes to the cases just cited, as denying the *right to the assured to abandon the voyage, if an enemy creates the impediment, and reserves his opinion on that point when the case shall arise. (6 *Johns. Rep.* 253.) His observations, therefore, must be all taken in reference to the particular case before him. The cases stated by *Emerigon* (1 *Emerig. Trait. des Ass.* 507. 512.) are to show when the vessel and cargo may be abandoned by the master and crew, as for fear of being taken and made slaves, when chased by pirates or corsairs, and there is no chance of escape or defence; or on account of the plague on board; or where the vessel, having struck a rock, the lives of the crew were in such imminent danger, that they took to the shore, as the only means of safety. The danger, to be equivalent to that *vis major*, which will justify the assured in abandoning the vessel, must be so imminent and certain as to render escape morally impossible. The principles laid down in *Craig v. The United Ins. Co.*, are decisive on this question. Here was, in fact, no actual blockade of *Gothenburgh*. It is true, that there were one or more *British* ships stationed in *Wingo Sound*, and many were cruising in the *Baltic*; but although the risk of capture was thereby greatly increased, it was not a peril direct, immediate, and certain.

Again; the voyage was actually broken up, and the cargo deposited with the agent of the owners, long before any notice of abandonment. The plaintiffs were too late, after having sold the vessel and broken up the voyage, to make the abandonment: besides, the plaintiffs did not make an actual abandonment, until a year after the notice was given. It is true, in case of a justifiable abandonment duly made, the master and owners are agents of the insurers; yet if they do acts inconsistent with the character of agents, they will be deemed to have elected to act on their own account, and not for the insurers.

Again; this is an insurance on the cargo; and *Swedish* vessels were perfectly free to enter and depart from *Gothenburgh*; and the cargo might have been sent, under the *Swedish* flag, to its port of destination. The plaintiffs have rendered no account of the cargo; nor have they shown what has become of it.

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**T. A. Emmet*, in reply. The *Syren*, when the declaration of war was known, was in a peculiar situation, so surrounded by the ships of the enemy, that it was impracticable for her to get out of *Gothenburgh*, without the certainty of capture. It is a much stronger case of a fear of capture, equivalent to a *vis major*, than that of *Craig v. The United Ins. Co.*, or of
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any cited from *Emerigon*. *Wingo Sound* was a fixed station for *British* ships, and a place of rendezvous for *British* cruisers, during the whole of the war. Sir *James Saumaraz*, with his fleet, was lying there, when the master of the *Syren* was informed of the war, and he had, three days before, applied for leave to sail, under the protection of a *British* convoy, to avoid capture by *Danish* privateers. If there can be a case of just fear equivalent to that violence which will justify an abandonment, this is such a one. Was it reasonable, in a commercial view,—and policies of insurance are intended to protect merchants in their reasonable speculations,—to keep the vessel and cargo at *Gothenburgh* until the end of the war, the period of which it was impossible to calculate? The true question is, Did the master or owner fairly exercise their judgment, under the circumstances in which the property was placed? Was not his conduct reasonable and just? Did he not do what every discreet and prudent man would have done in the same circumstances?

There is no material variance between the grounds stated in the notice of abandonment, and those on which it was actually made. There is precisely the same set of circumstances: there are no different or new facts stated in the abandonment.

The plaintiffs, or their master, have done no more than to land and warehouse the cargo. If the abandonment was justifiable, it is no matter, as regards this action, in whose hands the cargo was placed.

THOMPSON, Ch. J., delivered the opinion of the Court. No objection can be made against the sufficiency of the notice and cause of abandonment. A true statement of the facts, with respect to the situation of the vessel at *Gothenburgh*, was made, and given to the underwriters. Whether *it was to be deemed, in judgment of law, a restraint or a blockade, would not alter the rights of the assured growing out of such a state of facts. The real question, therefore, is, whether such a state of things existed, as to warrant an abandonment, and throw the loss upon the underwriters. The policy is in the usual form, and is very broad and comprehensive, in the enumeration of the perils insured against. It would seem to reach almost every risk to which a vessel and cargo may be exposed, in the course of a voyage. The loss, in this case, may, I think, fairly fall within the risk of *restraint of princes, or of men of war*. It is not necessary, to constitute a loss by this peril, that actual physical force should be applied to the subject insured. The case of *Schmidt v. United Insurance Company*, (1 *Johns. Rep.* 249.) was considered a loss by restraint of princes, when, in fact, there was only a blockade of the port of destination, and no actual physical force was exercised. A blockade was deemed equivalent to any other restraint or detention, which includes every

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peril arising from a *vis major*, which could not be resisted. It equally interrupts and destroys the voyage. In a late case decided in the Supreme Court of the *United States*, (*Oliver v. Union Insurance Company*, 3 *Wheat. Rep.* 183.) it was held, that a vessel within a port blockaded after the commencement of her voyage, and prevented thereby from proceeding, sustained a loss by a peril within that clause in the policy insuring against the arrests, restraints and detentions of kings, &c., and the insurers were made responsible for the loss. Ch. J. *Marshall* said, the term *restraint*, in the policy, does not imply that the restriction or confinement must be imposed by those who are in possession of the thing or person which is restricted or confined; but the term is satisfied by a restriction created by the application of external force; that although the blockading force is not in possession of the vessels enclosed in the harbor, yet it acts upon and restrains them. It is a *vis major* applied directly and effectually to them, which prevents them from coming out of port.

This cannot be considered an abandonment *quia timet*, when the danger was remote and contingent. The case shows, very fully, that the harbor of *Gothenburgh* was so invested *by the British squadron, as to make it morally certain that the *Syren* would have been captured had she attempted to go out. A state of war existing between us and *Great Britain*, there could be no reasonable grounds even to hope that she would have been permitted to pass the squadron; and an attempt to escape would have been idle. The restraint, therefore, operated as effectually as if she had been actually seized. It would, to be sure, have been no violation of duty, or of national law, to have attempted to force through, or elude the squadron, but it would have been madness in the master, and a violation of his duty to all parties, to have rushed headlong into the arms of the enemy, when a loss would have been inevitable. The language of the late chief justice, in the case of *Craig v. The Union Insurance Company*, (6 *Johns. Rep.* 252.) is very strong on this point; and the principles laid down in that case are applicable here. It is there said, that when such restraint actually exists, and is ascertained to be effectual, and no doubt arises of its being exerted, it would be most unreasonable to require the assured to go on, and submit to the experiment of a capture. This would be fatal to the interest of all parties; it would be against the duty of the assured, and he would be placed under a moral inability to do it.

The only circumstance which, in any manner, distinguishes this case from those I have referred to, is, that the blockade was by the squadron of a power at war with this country. Had not hostilities commenced, there could be no doubt that the restraint occasioned by the blockade would have been a loss within the policy, and justified the abandonment. I cannot see any substantial reason why that event should vary the principle,

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It would have been lawful to insure against capture by the enemies of this country. The breaking out of the war did not dissolve the contract of insurance; and I cannot discover, in any of the cases referred to as supporting such a distinction, any thing to warrant the conclusion that has been drawn. All those cases came under the review of this Court, in the case of *Craig v. United Insurance Company*; and although it is said, that they seem to hold up such a distinction, yet it is very far from being sanctioned or approved of by this Court. We are, accordingly, of opinion, that the plaintiffs are entitled to recover a total loss, and that judgment must be entered on the verdict.

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SHARP
v.
DORR.

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Judgment for the plaintiffs. (a)

(a) *Vide post*, 544.

WILLARD *against* JUDD.

J. PAINE, for the defendant, moved to change the *venue* in this cause, and read an affidavit, in support of the motion, taken before *Amasa Paine*, recorder, of the city of Troy.

An affidavit taken before a commissioner or recorder, who is counsel in the cause, may be read; but not if he is the attorney.

Dewitt, contra, objected, that the affidavit ought not to be read, as it was taken before *A. Paine*, who was counsel for the defendant. He cited *Taylor v. Hatch*, (12 Johns. Rep. 340.) in which the affidavit, taken before a commissioner, who was attorney for the plaintiff, was not allowed to be read.

Per Curiam. The rule laid down in *Taylor v. Hatch* applies only to the case of the commissioner, or officer, being the attorney of the party. The attorney is supposed always to draw the affidavit. There is not the same reason to object to the counsel.

SHARP *against* DORR.

DEY, for the defendant, moved to set aside the default, entered in this cause, for want of a plea. He read an affidavit, stating, that on the 3d of July, 1818, the defendant's attorney entered a rule for the plaintiff to declare, before the end of the next August term, of which notice was given to the plaintiff's attorney, on the 6th of July. No declaration having been re-

Where a rule is entered for the plaintiff to declare, before the end of the next term, the plaintiff has the whole of the last

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declare, before the end of the next term, the plaintiff has the whole of the last

day of the term in which to declare; and his default cannot be entered until the next day thereafter

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ceived, the defendant's attorney, on *Saturday*, the 15th of *August*, being the last day of the term, filed an affidavit of the service of the notice of the rule to declare, and entered a default, for not declaring, after three o'clock, P. M., of that day. On *Monday*, the 17th of *August*, the defendant's attorney was served with a copy of the declaration, and notice of a rule to plead, upon which he gave notice to the plaintiff's attorney, of the default for not declaring having been entered, and proceeded to complete his judgment. The plaintiff's attorney entered a default, for want of a plea, on the 16th of *October*, and gave notice of executing a writ of inquiry of damages, on the 30th of *October*.

Caines, contra, insisted, that the default entered, for not declaring, was irregular, as the plaintiff had the whole of the last day in which to declare, so that no default could be entered until the next day, or *Monday* following.

Per Curiam. The plaintiff was entitled to the whole of the last day of the term in which to declare, so that his default could not be regularly entered until after that day. But we grant the defendant's motion on payment of costs.

Motion granted, on payment of costs.

[* 533] *In the Matter of ELIZABETH COOPER, Widow, on a claim of dower, &c.

Notice in writing of an application to the surrogate, for the appointment of admeasurers of dower, must be given to the parties interested in the land; otherwise the proceedings will be set aside as irregular. But no costs are allowed on a motion in this Court, for that purpose.

SUFFERN moved to set aside the proceedings before the surrogate of *Rockland* county, as to the admeasurement of dower, under the acts concerning dower, and the act supplementary thereto. (1 N. R. L. 56. 60, 61. sess. 10. ch. 168.) (a)

Notice of the motion had been served on the widow, which stated the several grounds on which the application was to be made: some of these were, that the proceedings before the surrogate were *ex parte*, without any legal notice to the parties interested in the land, of the application to the surrogate; that no citation was issued by the surrogate to the parties interested, to show cause against the appointment of admeasurers of dower.

The counsel cited *Rathbun v. Miller*, (6 Johns. Rep. 282.) It appeared from the affidavits read, that the parties were verbally informed, on the 28th of *June*, by the person employed by the widow to obtain her dower, that he should apply to the surrogate on the 2d of *July*, for the appointment of commissioners

(a) 2 R. S. 483.

to assign her dower; but none of the parties appeared before the surrogate, who, on that day, without any citation or further notice, appointed admeasurers.

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ARNOLD
v.
SANDFORD

Drake, contra, contended, that there was sufficient notice in this case, and cited the case of *Watkins*. (9 *Johns. Rep.* 245.)

Per Curiam. The notice, in this case, was not sufficient. The application to the surrogate is a legal proceeding, affecting the rights of the parties interested in the land, who ought, therefore, to be duly apprized of it. On general principle, the notice ought to be in writing, and the want of it is a fatal objection to these proceedings. The motion must be granted, but without costs, as it is not a case within the statute relative to costs.

Motion granted accordingly.

*ARNOLD and others against SANDFORD.

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THE Court, in *October*, 1817, (14 *Johns. Rep.* 417.) on a demurrer to the assignment of errors in this cause, which was of an error in fact, to wit, the infancy of *Duncan*, one of the plaintiffs in error, gave judgment that the judgment of the Court below be revoked, *revocetur*; with liberty to the defendant, if he chose, to withdraw his demurrer, and rejoin to the assignment of errors. A certified copy of the rule for judgment of reversal was served on the attorney of the defendant, on the 2d of *November*, 1817, but he had not thought proper to avail himself of the liberty given to rejoin to the assignment of errors. A question having arisen, before the recorder of *New-York*, as to the taxation of costs, it was, by consent of the parties, submitted to the Court, whether the plaintiffs in error are entitled to their costs, under the 13th section of the act, passed *April* 12, 1813, (1 *N. R. L.* 343. 346.) (a) which gives costs to the plaintiff in error, on reversal. It was also submitted, whether the defendant in error, not choosing to rejoin to the assignment of errors, is not entitled to a rule on *Duncan*, the defendant below, to appear and plead *de novo*.

Where, in error to a Court of C. P., the judgment below was revoked for error of fact, to wit, the infancy of one of the defendants; the plaintiff in error was held entitled to costs under the 13th section of the act. (sess. 36, ch. 96. 1 *N. R. L.* 343. 346.) it being substantially a reversal of the judgment; and in such case, the defendant below may be ordered to appear and plead *de novo* to the declaration removed into this Court; having refused to rejoin to the assignment of errors, after leave given for that purpose, on withdrawing a demurrer.

Sampson, for the plaintiffs in error. He cited 6 *Johns. Rep.* 104. *Styles's P. R.* 288. 2 *Saund.* 319. 11 *Johns. Rep.* 460.

Slosson, contra, contended, that the plaintiffs in error were not entitled to costs. Previous to the statute of the 12th of *April*, 1813, no costs were ever allowed a plaintiff in error, on

(a) 2 *R. S.* 618.

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the reversal of the judgment below. As it is an alteration of the common law rule, as to costs, it ought to be construed strictly. The statute says, that in cases of *reversal*, the plaintiff in error shall be entitled to costs. *Reversal* is only for errors in law. Here the judgment was *revocatur*, for an error in fact, and, therefore, not within the words of the act. If it was a judgment of *reversal*, *there could be no further proceeding in the cause. But the judgment being *revoked* for an error of fact, *dehors* the record, the party will be allowed to proceed *de novo*, from the time when the error in fact began. There is no reason, therefore, for allowing costs in this case.

Per Curiam. The form of the entry of the judgment ought not to deprive the plaintiff in error of his costs. It is, substantially, a judgment of *reversal*; and, therefore, within the statute.

In *Dewitt v. Bost*, (11 Johns. Rep. 460.) we decided, that the proceedings might be reversed in part. The whole cause is removed from the Court below, and the record is here, so that we might award a *venire de novo*, returnable in this Court. If so, we may direct the infant to plead *de novo*.

The costs, on reversal, must, therefore, be assessed according to the statute; and the defendant in error may enter a rule for the defendant below, *Duncan*, to appear and plead *de novo* to the declaration removed into this Court. (a)

Motion granted

(a) Vide *Dran v. Hewit*, 5 Wendell's Rep. 257.

COSTER against WATSON.

An attorney
of this Court is
not good bail.
(a)

DEY, for the plaintiff, moved for an attachment against the sheriff of *New-York*, for not bringing the body of the defendant, pursuant to the rule entered for that purpose, a copy of which had been duly served on him.

E. W. King, contra, objected to the application, on the ground, that the defendant had regularly appeared, by putting in special bail, due notice of which had been given to the plaintiff's attorney.

It was admitted, that special bail had been put in by the defendant; but which had been *excepted to* by the plaintiff, on the sole ground that the bail was an attorney of this Court. The counsel for the plaintiff cited 1 *Tidd*, K. B. Pr. 230.

(a) Neither is a sheriff. *Bailey v. Warden*, 20 Johns. Rep. 129.

1 *Sellon's Pr.* 161. 1 *Taunt. Rep.* 164. 5 *Johns. Rep.* 230. **NEW-YORK**
 3 *Johns. R p.* 327. **Oct. 1818.**

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v.
ASHLEY

**Per Curiam.* It is a general rule of the Court of K. B. that no attorney of that, or any other Court, shall be bail, in any action depending in that Court. (1 *Tidd's Pr.* 230.) The same rule prevails, also, in the Court of C. B. (1 *Taunt. Rep.* 164. note.) There appears to be good reason for the rule, and we, therefore, adopt it. The motion is granted.

The counsel for the parties agreed, that the rule should be, that the sheriff put in other sufficient bail, in *four days*, or that an attachment issue against him.

Rule accordingly.

BAKER against ASHLEY.

E. WILLIAMS, for the defendant, moved to set aside an inquest, taken, by default, in this cause, at the last *sittings* in *New-York*, and all subsequent proceedings, on the ground of irregularity.

The inquest was taken out of its order on the calendar of causes; and the notice of trial was, that it would be taken as an inquest.

It appeared that an affidavit of a good defence, on the merits, had been regularly filed with the clerk of the sittings, but that a copy of it had not been served on the plaintiff's attorney.

Where a cause is noticed for trial, and as an inquest, a copy of the affidavit of defence filed with the clerk of the sittings, must be served on the plaintiff's attorney; otherwise, the defendant must pay costs, in case the inquest, taken by default is, afterwards, set aside.

E. H. Ely, for the plaintiff.

Per Curiam. The general rule of *November* term, 1803, requires, that a copy of the affidavit of defence should, also, be served on the plaintiff's attorney, in order to excuse the defendant from paying costs, in case the inquest is set aside; and it was so decided in *Cannon v. Titus*. (5 *Johns. Rep.* 355.) The motion is granted, but it must be on the payment of costs.

Motion granted.

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KINDERHOOK
v.
CLAW.

*Commissioners of Highways of the Town of KINDERHOOK against CLAW and another.

On an appeal from the decision of the commissioners of highways to three of the judges of the Court of Common Pleas, under the 36th section of the act to regulate highways, sess. 36. c. 33. (2 N. R. L. 282.) if the decision of the commissioners is reversed, a *certiorari* will lie on the behalf of the commissioners, to remove the proceedings into this Court; the right to bring a *certiorari* being reciprocal, and belonging as well to the commissioners as to the appellants. (a)

On an appeal from the decision of the commissioners of highways, relative to the lay-

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ing out, altering, &c., a highway, the appellant must give notice of the appeal to the commissioners, and if such notice was not given, the commissioners may bring a *certiorari*, on which the proceedings on the appeal will be reversed.

It is not sufficient that notice was given to the town clerk.

Wherever magistrates proceed judicially, both the parties to the proceedings are entitled to be heard, and notice to both is indispensably requisite, notwithstanding there is no direction in the act by which the tribunal is constituted, that notice shall be given.

(a) Vide *Pugsley v. Anderson*, 3 *Wendell's Rep.* 468. *Bouton v. The Rest, &c. of Brooklyn*, 2 *Ibid.* 395. *Clark v. Phelps*, 4 *Cow. Rep.* 190.

(b) 1 R. S. 518.

IN ERROR, on *certiorari* to three of the judges of the Court of Common Pleas, of the county of Columbia, to whom an appeal had been made by the defendants in error, under the 36th section of the act to regulate highways, sess. 36. c. 33. (2 N. R. L. 282.) (b) against a determination of the plaintiffs in error, relative to the regulating and altering a highway in the town of Kinderhook, in the county of Columbia.

The affidavit of the plaintiffs, on which the *certiorari* was allowed, alleged, that no notice had been given to them, or to the town clerk of the town of Kinderhook, of the appeal, and that their decision had been reversed on an *ex parte* hearing. It appeared, however, from the return of the judges of the Court of Common Pleas, that the town clerk did attend at the hearing, and produced the records of the town in relation to the subject of the appeal; but in their additional return, they stated, that they did not know that any notice was given to the plaintiffs; and that it was stated to them by the attorney for the defendants, that the act did not require any notice; and that upon examining the act, they decided that no notice was required. The decision of the plaintiffs in error was reversed, solely upon testimony adduced by the defendants, without any examination of the road by the judges.

Vanderpool, for the plaintiffs, contended, that the commissioners of highways ought to have had notice of the appeal. Although the statute did not require notice to be given, yet the act to be performed being *judicial*, a notice was necessary. *(*Bouton v. Neilson*, 3 *Johns. Rep.* 474. *Rathbun v. Miller*, 5 *Johns. Rep.* 291.) A *certiorari* lies in this case, to bring the proceeding before this Court. (*Lawton v. Commissioners of Highways of Cambridge*, 2 *Caines, Rep.* 179.)

Van Buren (attorney-general) insisted, that as the statute did not require any notice to be given either to the owners of the land or to the commissioners, on an appeal from their decision, it was not necessary. In all those cases in which a notice was deemed necessary, the act specially required it to be given, as in the 6th, 20th, 38th and 40th sections.

VAN NESS, J., delivered the opinion of the Court. The point

made by the plaintiffs in error, is, that their proceedings in regulating and altering the road in question have been reversed, on an appeal to three judges of the Court of Common Pleas, without any notice having been given to them of the bringing of such an appeal, and of the time and place for hearing and deciding it. That a *certiorari* lies to the judges to remove the proceedings had before them on an appeal from the commissioners of highways, into this Court, was decided in the case of *Lawton and others v. The Commissioners, &c. of the Town of Cambridge*. (2 Caines's Rep. 179.) The *certiorari* there was brought by the owners of the land against the commissioners of highways; and there can be no question that the right to remove the proceedings on the appeal into this Court is reciprocal. The duty imposed upon the judges is strictly judicial: they are to exercise a discretion, and to decide, after inquiring into all the circumstances of the case: in every proceeding of such a nature, both parties are entitled to be heard, and notice to both is indispensably requisite. This principle has been so long and so frequently settled, that it is unnecessary to cite cases in support of it. There is a peculiar propriety in requiring notice to be given in appeals from the commissioners under the highway act. They act under their oath of office, in the discharge of a public trust, and, it is to be presumed, in strict conformity to all the requirements of the statute. An appeal to three judges opens the whole matter; and if the proceedings of the commissioners are liable to be reversed, without notice, upon the mere *ex parte* allegations and proofs of the plaintiff, the probability is, that their determinations would be overturned in every instance. If notice of the appeal be necessary at all, it clearly must be given to the commissioners. It is their act which is sought to be set aside: they know the facts upon which they have founded their proceedings, which it is their duty to defend and maintain, as the representatives of the town, in all matters pertaining to the regulating, altering, or laying out of roads and highways. Notice to the town clerk would be altogether useless, though, in this case, no notice of the appeal was even given to him. The opinion of the Court is, that the decision of the three judges on the appeal must be reversed.

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Judgment accordingly.

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JACKSON

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LAWSON.

JACKSON, *ex dem.* BATES, *against* LAWSON.

A. devises a farm to his wife, during her widowhood, remainder to his children; B., claiming under a deed of the

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land from A., brings an action of ejectment against the widow and another person, in which he recovers on proof of the existence and contents of the deed from A., which was lost, or otherwise could not be produced, and goes into possession on this recovery.

After the death of the widow, C., claiming as the grantee of some of the devisees in remainder of A., brings an action of ejectment against B., and on the trial, B. produces the record of the former recovery by him, and offers evidence of what had been sworn to, on the trial of that suit, by a witness since deceased, whose testimony went to establish the existence of the deed from A. to B. Held, that the evidence was admissible; that the widow, and the remainder men, from whom C. derived his title, and who all claimed under the will

of A., were privies in estate; and that the evidence of a deceased witness, in a former suit, is testimony, not only where the same point in issue afterwards arises between the same parties, but also for A. against persons standing in the relation of privies in blood, privies in estate, or privies in law. (a)

THIS was an action of ejectment for a farm in *Poughkeepsie*, in the county of *Dutchess*. The cause was tried before Mr. J. *Van Ness*, at the *Dutchess* circuit, in August, 1817.

On the trial, *John C. Brower*, a witness on the part of the plaintiff, testified, that he knew *William Lawson*, the father of *Peter Lawson*, and the grandfather of the defendant; that *W. Lawson* died in possession of the premises in question *in July, 1791; that the defendant was in possession of about fifty or sixty acres of land, the premises in question, which the defendant recovered in an action of ejectment against the witness, and *Elizabeth Lawson*, widow of *W. Lawson*, and that he went into possession by virtue of that recovery, seventeen or eighteen years before the trial, and had continued in possession ever since; that when *W. Lawson* died, he left his widow, *Elizabeth*, who is since dead, in possession; and that *Peter Lawson* had possessed the farm for a long time previous to his death, and the witness always understood that he bought the farm of his father, *W. Lawson*.

William Lawson, by his will, dated 6th of May, 1790, devised his real estate, as follows:—"It is my will, that my daughter *Catharine*, the wife of *Matthew Boyce*; *Ippea*, the wife of *Benjamin Phillips*; the heirs of *Gertrude* and *William Jaycocks*, deceased; the heirs of *Annatje* and *John Ferdun*, deceased; my son *Simeon Lawson*; the heirs of my son *Johannes Lawson*, deceased; (that I, in the lifetime of my son *Peter*, have given him his portion, and that his heirs have no demand on my estate;) the rest of the above named to be my lawful heirs after my decease. Notwithstanding, my wife, *Elizabeth*, is to remain in full possession of all my estate, real and personal, during her widowhood."

The plaintiff, also, gave in evidence the following deeds to his lessor:—A deed from *John Velie* and *Catharine*, his wife, one of the children of *Annatje*, dated December 16th, 1791, which was acknowledged by the wife only, but was admitted to be read, subject to all objections; a deed from *Simeon Lawson*, dated 14th November, 1791; and a deed of the same date from *Thomas W. Jaycocks*, one of the children of *Gertrude*. These deeds purported to convey all the right of the grantors in the farm of *W. Lawson*, of which the premises in question formed a part.

Matthew Lawson, a witness on the part of the defendant,

(a) Vide *Jackson v. Crissey*, 3 *Wendell's Rep.* 951 *Powell v. Waters*, 17 *Johns. Rep.* 176. *11th v. Selden*, 5 *Cowen*, 162.

testified, that *Peter Lawson*, who died before the revolutionary war, and before his father, *William*, leaving the defendant his heir at law, bought the farm of his father, and that after the death of *Peter*, *William* told the witness that he had sold the land to *Peter*, and since his death had got *back the deed. He also stated, that *Peter* died in possession. Another witness testified, that *Peter* bought the land of his father in the spring, and died about seed-time, the same year, in possession, and that his family continued in possession a year or two after his death. The deposition of *Simeon Lawson*, one of the sons of *W. Lawson*, taken under the act to perpetuate testimony, was also read on the part of the defendant, which corroborated the testimony of the other witness on the part of the defendant, and stated that the witness, during the life of *Peter*, had heard his father say, that he had sold the south half of his farm in *Poughkeepsie* to *Peter*, and had given him a deed.

The defendant then gave in evidence the record of a recovery in an action of ejectment in this Court, for the land in question, wherein *James Jackson*, on the demise of *John Lawson*, the now defendant, was plaintiff, and *Elizabeth Lawson*, the widow of *W. Lawson*, and *John Brower*, were defendants, and which cause was tried on the 14th of *June*, 1797, before *Morgan Lewis*, Esq., then one of the justices of this Court, and judgment was signed the 4th of *August*, 1797. The defendant then offered to prove that the lessor of the plaintiff was present at the trial in that suit; that he was the agent of *E. Lawson*, in preparing the defence, conducting the trial, and examining and cross-examining the witnesses; and that *Peter Dubois*, who is since dead, was sworn as a witness at that trial, on the part of the then plaintiff, and testified, in the hearing and presence of the lessor in this suit, that he surveyed the premises in question on the 14th of *February*, 1769, at the request of *P. Lawson*, and his father, *William*, and drew a deed in fee simple from *William* to *Peter*, and a bond from *Peter* to *William* for the purchase money, and that *William* told the witness, some months afterwards, that he had conveyed the premises to his son, and was afraid that he would not be able to pay the residue of the consideration money. This testimony was objected to, and excluded by the judge. The jury found a verdict for the plaintiff, which the defendant now moved to set aside, for a new trial, on the grounds, 1. That the verdict was contrary to evidence; and, 2. That the judge had rejected proper testimony.

**Oakley*, for the defendant, contended, that the defendant, having shown a prior possession in his father, it was evidence of right, and ought to prevail against a subsequent possession of *W. L.*, the elder, especially where a descent had been cast, as in this case. (*Smith v. Lorillard*, 10 *Johns. R.p.* 333—356.) Besides, there was sufficient evidence of a conveyance from *W. L.*, the elder, to *P. L.*, the father of the defendant. If there

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could be any doubt on this point, that doubt would have been removed by the evidence offered of what *Dubois*, a witness since deceased, swore on a former trial of the action of ejectment against the widow of *W. L.* and *J. B.* The lessor of the plaintiff was present at that trial, and examined the witnesses. The admission of this species of evidence is a departure from the strict technical rules of law, and allowed from necessity. (*Jackson v. Bailey*, 2 *Johns. Rep.* 17. 20. *Taylor v. Brown*, 1 *Raym.* 170.) In *Calhoun's Lessee v. Dunning*, (4 *Dallas*, 120.) it was objected that a record of an action of trespass, brought by the defendant against one *Caruthers*, could not be read in evidence, as it was not between the same parties; but the objection was overruled, on the ground that *Caruthers* was the person really interested as the owner of the land; and that *Calhoun*, the lessor, was a mere trustee for him.

A verdict for or against a lessee is evidence for or against him in reversion; and a verdict for him in remainder is evidence against a subsequent remainder man; for he claims by the same deed. (*Pyke v. Crouch*, 1 *Ld. Raym.* 730. *Com. Dig. Evidence*, A. 5. *Nin. Abr. Evidence*, T. b. pl. 4.) In the case before the Court, there is the same privity of interest.

P. Ruggles, contra, contended, that if the defendant claimed under a conveyance from *W. L.*, it was the same source of title as that of lessor of the plaintiff, and he could not defend on the ground of his prior possession, which could not be adverse. To admit the parol declarations of *W. L.*, made 25 years ago, would be most dangerous, unless some account was given of the deed. (*Jackson v. Shearman*, 6 *Johns. Rep.* 19. 21.)

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Again; evidence of what a witness, since deceased, *swore at a former trial, is not admissible, unless in an action between the same parties. (*Jackson*, ex dem. *Schuyler*, v. *Vedder*, 6 *Johns. Rep.* 8. 14.) The only exception to this rule is the case of a remainder man.

VAN NESS, J., delivered the opinion of the Court. The first question I shall consider is, whether the testimony given by *Dubois*, in the action of ejectment brought by the present defendant against the widow of *William Lawson* and *Brower*, and in which the then plaintiff had judgment in 1797, was properly rejected or not. By the will of *William Lawson*, he devised all his estate to his wife during her widowhood, with remainder to certain of his children and grandchildren, part of whose estate the now lessor of the plaintiff purchased in 1791. Both the widow of *William Lawson*, and the lessor of the plaintiff, thus claim under the same will; and I am inclined to think, that there is such a privity of estate between them, and the verdict in that case was, for certain purposes, evidence (though not conclusive) in this. It was evidence, at least, to lay the foundation for admitting the testimony given by *Dubois*, more
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especially as the lessor of the plaintiff, in point of fact, had notice of, and defended the former ejectment; was present at the trial, and had an opportunity of cross-examining the witnesses, though I lay no particular stress on these latter facts. The estate devised to the widow during her widowhood, and the remainder over, constitute but one estate carved out of the same inheritance, created and subsisting together, the one in possession, the other in expectancy. An estate in remainder is a present interest, though to be enjoyed in future, and is capable of being aliened, devised, and otherwise disposed of, in the same manner as an estate in possession. The possession of the widow was, for certain purposes, the possession of the remainder men, and the entry of the present defendant, under the recovery in the ejectment, was a prejudice to those in remainder, for, in consequence of it, the estate in remainder has become a right in action only. The lessor of the plaintiff had an interest in defeating the recovery, and his right was so interwoven with that of the widow, that the evidence of **Dubois* affected the one almost equally with the other. My attention was not called to this view of the subject at the trial; and the fact, that the present lessor of the plaintiff had purchased part of the estate in remainder before the trial in 1797, was overlooked; and the counsel for the defendant put the admissibility of the testimony offered, on the ground that the lessor of the plaintiff was the agent of the widow, and present at the trial. It was held, by Ch. J. *Holt*, "that if several estates in remainder be limited in a deed, and one of the remainder men obtains a verdict for him, in an action brought against him for the same land, that verdict may be given in evidence for the subsequent man remainder in action brought against him for the same land, though he does not claim any estate under the first remainder man, because *they all claim under the same deed*." *Pike v. Crouch*, (1 Lord Raym. 730.)

If the verdict in the former ejectment was admissible on the trial of this suit, by reason that the tenant for life and the remainder men are privies in estate, it follows, that the evidence given in the first suit by a deceased witness, is also admissible. The rule is, that such evidence is proper, not only when the point in issue is the same in a subsequent suit between the same parties, but also for or against persons standing in the relation of privies in blood, privies in estate, or privies in law. On this ground, the defendant is entitled to a new trial; though, independently of this, I think a new trial ought to be granted on the other grounds taken in the argument, that the verdict is against the weight of evidence. The proof of a conveyance by *William Lawson*, in his lifetime, to his son *Peter*, is very clear and satisfactory.

New trial granted, with costs to abide the event.

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IN the case of *Saltus v. The United Insurance Company*, ante, p. 531, add, VAN NESS, J., dissented.

In the case of *Whitbeck v. Cook and Wife*, ante, p. 483, the following opinion of Mr. Justice *Van Ness* should have followed that delivered by Mr. Justice *Spencer*, in which the three other judges concurred.

VAN NESS, J. The questions presented for the decision of the Court on this case arise, 1st. Upon a demurrer to the fourth count in the declaration; 2d. Upon a case made at the trial of the issues taken on the first, second, and third breaches; and, 3d. Upon a motion in arrest of judgment.

1st. As to the demurrer. The fourth breach is assigned upon the covenant for quiet enjoyment, which is alleged to have been broken, by reason, that at the time of the execution of the deed, eleven acres, two roods, and twenty perches, parcel of the land conveyed, was, and for a long time before that time, and ever since, had been, a common and a public highway, agreeable to the laws and statutes of this state; and had been, for all the time aforesaid, used, occupied, and enjoyed, by the people of this state as such common and public highway, &c. The objection is, that this breach does not, in terms, or in substance, aver an eviction of the plaintiff, and it is insisted that no action can be maintained for a breach of this covenant, unless the declaration contains such an averment. This point has been so frequently decided in this Court, that it is no longer open to argument. "The covenant for quiet enjoyment," say the Court, in *Cortz v. Carpenter*, (5 Johns. Rep. 121.) "goes to the possession, and not to the title. It appears to be a technical rule, that nothing amounts to a breach of this covenant, but an actual eviction, or disturbance *of the possession of the covenantee." The defendant, therefore, is entitled to judgment on the demurrer, and the contingent assessment of damages on this breach goes for nothing.

2d. As to the case, upon which the defendant makes three points: 1. That the wife is not bound by the covenants in the deed declared on, and that she may take advantage of this on the plea of *non est factum*, which is one of the pleas in this case; 2. The plaintiff having declared on a joint contract, and one of the defendants, (the wife,) not being liable on it, that he should have been nonsuited.

3 That the existence of such highway as is stated in the case, is not a breach of the covenants upon which the parties went to trial.

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4. That the rule of damages adopted on the trial (admitting the existence of such road to be a breach of the covenants on which the parties went to trial) was not correct.

The two first points involve the same inquiry, and may be considered together. Although, in general, it is true that, during coverture, the power of the wife to contract is suspended, so that she is disabled to bind herself by any agreement, yet it is equally true, that there are exceptions to this rule. When the husband and wife unite in a *fine sur concessit*, with a warranty, she is bound by the covenant, and an action may be maintained upon it against her. This was so decided, after great consideration, in the case of *Wotton v. Hele*, (2 Saund. 177, and which is also reported in several other books, 1 Mod. 290. 1 Lev. 301.) The facts were, that *Hele* and his wife levied a *fine sur concessit*, by which they granted certain lands to the plaintiff, *Wotton*, for 99 years, if he should live so long, with covenant of warranty. After the death of the husband, a suit was brought on this covenant against the wife, who survived him, and a verdict was found against her; and on a motion in arrest of judgment, one, among other questions made, was, whether the action of the covenant would lie upon the warranty, it appearing that the defendant at the time of the fine levied was a *feme covert*. In support of the motion, it was argued, that although *femes covert* may pass their right in lands by fine, because they are examined by a judge of record, yet they cannot bind themselves in a personal security, by covenant; for that a *feme covert* cannot covenant to pay damages. The Court, however, decided, "that the action will lie against the defendant on her warranty in the fine, although she was covert of baron, and they did not make any scruple of it." In the report of the case in 1 Mod. Rep., it is stated, that "this point was agreed by the counsel on both sides, that covenant on this warranty would lie against her." It is not expressly stated in the report of the case; but enough is said to induce a belief, that the lands in fact were the lands of the husband. With respect to this case, it is to be observed, that the warranty was contained in a fine, which is one of the highest matters of record, "and for its worthiness, and the peace and quiet it brings," is termed *finis, fructus, exitus, et effectus, legis*. (Plow. 253. a.) It has grown, in England, to be the most common assurance or conveyance, and is the proper mode for a married woman to dispose of her land: it partakes of the solemnity, and has the same effect as a judgment, against which there can be no averment, while it remains unreversed or set aside; and it would seem that a power to warrant by a *feme covert*, who joins in a fine even of her husband's lands, is incident to that mode of alienation: at any rate, it appears to be settled, that

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she is bound by such a covenant, as much as her husband. Between a covenant thus made, and a covenant in a deed, there is a great difference, and so it was held in the case of *Brereton and Wife v. Evans*, (*Cro. Eliz.* 700.) which will be noticed presently, for another purpose. There is another class of cases, which is, in some measure, also, an exception to the general rule of law, namely, where the husband and wife, before the statute 32 *H. VIII.* ch. 28, make joint leases of the lands of the latter, for life or years; it having been uniformly held, that if the wife, after the death of her husband, ratify such leases, by the acceptance of rent, or by any other equivocal act, she is bound by them, and liable to the covenants they contain. (*Cro. Jac.* 563, 564. 1 *Mod. Rep.* 291. *Courp.* 201. 2 *Saund.* 180. note 9, and cases there cited.) This class of cases has, however, always been considered as an exception to the general rule of law, and *was allowed for the advancement of agriculture and tillage. (*Goodright v. Straphan, Courp.* 203.) In that case, the general position, that the deed of a married woman is void, is expressly recognized by Lord *Mansfield*, in delivering the opinion of the Court. The ground upon which the wife is bound in such cases, is not that the lease was good as to her, at its creation, but that she has ratified and confirmed it after the death of the husband, when she was free to affirm or disaffirm it, at her election. Grants by way of fine are, in a great measure, unknown in this state, except for the purpose of strengthening a good, or guarding against the defects of a doubtful or disputed title; and a married woman, with us, may alienate by any of the common assurances in use, provided she be examined by certain commissioners designated by law for that purpose, in the same manner as is necessary in levying a fine by the *English* law: hence it may be argued, that as this latter mode of alienation has been adopted as a substitute for a fine, that an alteration in the mere form of the conveyance cannot alter the substance of it, and that the liability of a *feme covert* upon her covenants for the title, must be the same, whether such covenants are contained in such conveyances as are permitted, rather than prescribed, by our law, or in a conveyance by way of fine. This has, however, never been the understanding of the profession in this state.

The deed of a *feme covert*, executed and acknowledged pursuant to the statute, is good to pass all her interest in the land; but it has never, I believe, been supposed that she could bind herself by any of the covenants for the title which are commonly contained in the conveyances in use among us. Such covenants on the part of the wife, I suspect, are never inserted, when the deed is drawn by a professional man; and whenever they are inserted, it is where the blanks have been filled up by some ignorant scrivener in a printed deed, who does not know the legal effect or meaning of the words he makes use of. It would be alarming, indeed, if every married woman

who entered into such covenants, where she is a party to the conveyance, solely for the purpose of barring her right of dower, should be held answerable for the failure of her husband's title. Except the *two classes of cases which have been adverted to, and, perhaps, a few others of a local or trifling nature, it may be laid down as a universal rule, that every contract entered into by a *feme covert* is absolutely void; not voidable merely, but void.

It may be useful to advert, somewhat at large, to some of the cases where this doctrine has been considered, to show the great tenderness of the common law in protecting the wife, not only against the power and undue influence of the husband, but also against the acts and impositions of others. In an anonymous case, reported in 12 *Mod.* 607, *Holt*, Ch. J., held, "that though a *feme covert* seal and deliver a deed, yet she may plead *non est factum*, and give coverture in evidence." "Her contract is merely void as to binding herself," say all the judges, in *Mumby v. Scott*, (1 *Sid.* 120.) In the case of *Linch v. Hooke*, (6 *Mod.* 311. *S. C.* *Salk.* 7.) the defendant, a *feme covert*, was arrested by the name of *Minors*, and gave a bail-bond by that name, and then would plead misnomer; and by the Court, "if a *feme covert* be arrested by a wrong name, and gives a bail-bond by that name, yet she may plead misnomer; for the bond being that of a *feme covert*, she may plead *non est factum* to it; therefore, it will not estop her." In the case of *Brereton and Wife v. Evans*, (*Cro. Eliz.* 700.) the plaintiff brought debt against the defendant for rent, upon a lease for years made by the *feme* and her first husband, to the defendant, by indenture. The defendant pleaded, that the ancestor of the first baron was seised in fee, and that it descended to the first baron, and he was sole seised, and so the *feme covert* had nothing at the time of the lease made, and thereupon the plaintiff demurred in law; "but all the justices resolved that it was a good plea; for that where two joined in a *fine* or *matter of record*, he who accepts of them is concluded to say, but that both gave it; but *when it is by deed, it is otherwise*; for that cannot enure from one by way of interest, and from the other by way of estoppel; for one deed cannot so enure to two intents. Also, when two join in a deed, and the one only hath an interest, it enures by way of confirmation from the other, and not by way of estoppel. But here this can neither be an estoppel, nor a confirmation, for the *deed is utterly void as to the feme, she being *covert*; and it cannot be an estoppel, for an estoppel ought to be mutual on both parts; and a deed of a *feme covert* does estop her, and the deed cannot bind her to any effect." In *Goodright v. Straphan*, (*Cowp.* 203.) before cited, Lord Mansfield, in speaking of leases made by husband and wife, and of their binding the wife in case she ratifies them after her husband's death, says, that the authorities to that effect are exceptions to the general rule of law, which says, the deed of a married woman is void; and the passage which he cites from *Perkins* shows the difference between the deed of an

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infant, which is *voidable*, and that of a *feme covert*, which is not. These cases, to which many more might be added, show that the deed of a *feme covert*, whether executed with or without her husband, is void; and the exceptions to this proposition do not reach the present case. It follows, that the wife is not bound by any of the covenants upon which the plaintiff has counted. Whether the plaintiff can have judgment against the husband alone, is a point to be considered hereafter. It is proper first to consider the third point made upon the case:—

3. Whether the existence of the public highway is a breach of either of the covenants upon which the parties went to trial? These covenants are, 1st. That the defendants were the true and lawful owners of all the land conveyed; 2d. That they were lawfully seized of a perfect, absolute, and indefeasible estate, in fee simple, and that they had, in themselves, good right, full power, and lawful authority, to grant and convey in the manner aforesaid. It is not necessary, in order to maintain an action on either of these covenants, that the plaintiffs should aver or prove an eviction. If it appear on the trial, that the title of the grantor, from any cause, was not, in point of fact, such as he covenanted it to be, and any damage has resulted to the grantee, that is all which is required to be shown. Whether the fact, which is admitted in this case, that upwards of eleven acres of the land conveyed were used and enjoyed as a public highway before, at the time, and ever since the execution of the deed, is a breach of either, or of all these covenants, is the question; and it appears to me that the simple statement of it is sufficient to show, that it must be answered in the affirmative. The *covenant of seisin implies that the grantor is the exclusive owner. That this is so, is evident from the nature of the covenant, and the reason of the thing; for, otherwise, if the grantor had previously given a lease for years or for lives, and had a mere reversionary interest, or an estate in remainder, his covenant would not be considered as broken. Suppose the plaintiff had entered under this deed, and that he had been evicted by a title derived under a lease given by the grantor, or some person from whom he had derived his title, can it be supposed, for a moment, that such an eviction would not be a breach of the covenant of seisin? The books abound in cases to show, that such an eviction is a breach of a covenant for quiet enjoyment, which differs only, in its nature and legal import, from a covenant of seisin, in this, that there can be no breach of it, so as to give a right of action, unless the plaintiff has been evicted or disturbed in his possession. This covenant also implies, that the covenantor has a seisin in fact, and that the covenantee shall have a right to enter, and enjoy the land, and cultivate and use it as he sees proper; and that he may sell and convey it, in the same manner, to others. The seisin contemplated by this covenant is, that the grantor is entitled to the immediate possession of the land, and to exercise that uncontrolled and exclusive dominion over it, to which the lawful owner is en-

titled. Now, where a lawful public highway covers part of the land, at the time such covenants are entered into, the grantor has no right of entry, and his grantee, as long as such road continues, (and it is to be presumed it will continue forever,) is as effectually excluded from the enjoyment of the land over which the road is laid, as if the grantor had previously conveyed it in fee simple. The injury is as great, and the substance of the covenant is as much broken, in the one case as in the other. Suppose there had been no other land conveyed, except that covered by the road; would it not be an affront to common sense to say, that because, by possibility, at some future period, the road might be discontinued, and the grantee's heirs or assigns might then enter and enjoy it, that, therefore, the grantors were to be considered as being, within the meaning and legal intent of these covenants, the lawful owners seised *of a *perfect* and absolute estate in fee simple, and having full power to sell? The case of *Kellogg v. Ingersoll*, (2 Mass. Rep. 97.) is very much like the present. There the defendant sold, with a covenant that the land was free from encumbrances; and the breach alleged is almost in the very words of the fourth breach in this case. The counsel for the defendant there argued, as the counsel has in this case, that the facts averred in the breach gave no right of action; but the Court decided otherwise, and for reasons which apply, with full force, to this case. That, it is true, was a covenant against encumbrances; but if the existence of such a road was a breach of that covenant, *a fortiori*, I should suppose it to be a breach of the covenants in this case. A mortgage and a judgment are, strictly speaking, encumbrances: now, suppose a conveyance to have been made of lands which had been previously mortgaged, or against which there was an unsatisfied judgment, and that the land is sold under the mortgage or judgment, and bought by the grantee or a stranger, whereby the title under the conveyance is defeated; can it be doubted that this would be a breach of the covenant of seisin, as well as of the covenant against encumbrances? It was said, that if the existence of a public highway at the time of executing this deed is a breach of these covenants, the laying out a highway afterwards would be a breach also. This is altogether fallacious. The laying out of a road is an act of the government, and is not done through the agency or any default of the grantor; and any person who purchases land, does so, knowing that the government may appropriate such part of it for public use as the public good may require; but, in every such case, the present owner or proprietor receives an adequate compensation, and has, therefore, no other claim. It has been argued, that where conveyances include highways, the grantee takes the land subject to the easement; and knowing of its existence, it would, therefore, be unjust and inequitable that he should maintain an action on any of the usual covenants in the deed. But, in a Court of law, these considerations can have no

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influence. The question *here* is not, whether the grantee did, or did not, know of the existence of the road. Whether the covenant is broken *or not, cannot depend upon that fact, nor can it at all be the subject of inquiry. A Court of law must judge from what appears in the deed itself, and is not permitted to travel out of it to determine its legal effect. Let us suppose, however, the grantee to have been an entire stranger to the land; that he had never seen it; that he purchased it by the acre, and that all the land described in the deed had been covered by a highway; how would the equity of the case then stand? If, in this case, the grantee knew of the existence of the road, and the deed had been executed under mistake or misapprehension, the grantee might, perhaps, have relief elsewhere; but in this Court he is bound by the terms of his covenants.

I am, accordingly, of opinion, that the plaintiff has shown a right to recover against the husband. The next question is, What shall be the rule of damages? I have no hesitation to say, the consideration money, as in other instances. The existence of the road is equivalent to a total failure of title. If, however, this is not the true rule, but the actual damages sustained is to be the measure, still there is no reason to disturb the verdict, because it does not appear what rule of damages the jury or judge adopted; and whatever it was, it was not complained of at the trial. The only remaining question arising upon the case is, whether the plaintiff can take judgment against the husband alone. This is a question of some difficulty; but I think the principle established by this Court, in the case of *Hartness v. Thompson and others*, embraces the case before us, and ought to govern its decision. In the case of *Colcord et al. v. Swan and Wife*, (7 *Mass. Rep.* 291.) the defendants were sued on a covenant of warranty, and the Court, after deciding that the action could not be maintained against the wife, gave the plaintiff leave to enter a *nolle prosequi* as to her, and to proceed against the husband alone. This was done before verdict, and, as I should infer from the report of the case, upon the trial.

3. As to the motion in arrest of judgment, the remarks which have already been made, dispose of all the objections to the declaration, except that it is not averred that the deed was duly acknowledged by the wife. This, however, is not material to be decided, because the wife is not *liable on any event. The course proper to be taken, if the opinions which I have expressed are correct, would be to require the defendant to alter the *postea*, so that it should appear that the plaintiff was nonsuited on the trial, as to the wife, or, that a verdict was taken for her at the election of the wife; and if he did not consent to this, that the motion in arrest of judgment generally should be granted.

CASES

ARGUED AND DETERMINED

IN THE

Court for the Trial of Impeachments

AND

THE CORRECTION OF ERRORS

OF THE.

STATE OF NEW-YORK,

IN FEBRUARY, MARCH, AND APRIL, 1818

DAVID DUNHAM, appellant,
against
ANTHONY DEY, respondent.

THIS was an appeal from the Court of Chancery. The respondent, in his bill in the Court below, stated that *Matthias* and *William Ward* were copartners in the business of book-sellers, before, on, and after the 27th of *January*, 1810, on which day, *M. Ward* was seised of fifty lots of ground in the ninth ward of the city of *New-York*, containing each 25 feet by 100. That *M. Ward* gave to the appellant a deed of conveyance for these lots, which was absolute on the face of it, but was intended only as a security, or for some temporary purpose understood

A deed purporting to be an absolute conveyance of land, but, in fact, intended as a security for a debt, is a mortgage. (a)

A party can not obtain relief in equity, against a mortgage given for a usurious debt.

without offering to redeem, on payment of the principal and legal interest.

Where a mortgage is given as security for the payment of promissory notes, which are from time to time renewed, the renewal is not to be deemed an extinguishment of the original debt, so as to affect the continuance of the security.

A person who takes a conveyance of land, with notice of a prior unregistered mortgage, is not a *bona fide* purchaser who can gain a priority by having his deed first recorded. (b)

Where a person conveyed all his property, real and personal, without any particular description in the body of the deed, but in a schedule annexed, certain lots, previously mortgaged by the grantor to *D. D.*, were described as "lots of ground in *Stuart street*, the title to which is in *D. D.*," it was held that this was notice to the grantee of the prior mortgage to *D. D.*, which had never been recorded, and that therefore, the grantee could not, by having his deed first recorded, obtain a priority.

(a) Vide *Brown v. Bean*, 3 *Wendell's Rep.* 208. *Lane v. Shears*, 1 *Ibid.* 433. *James v. Morey*, 2 *Conn. Rep.* 246. *Clark v. Henry*, 2 *Conn.* 324.

(b) *Jackson v. M'Chesney*, 7 *Conn. Rep.* 360. *Berry v. Mutual Ins. Co.*, 2 *Johns. Ch. Rep.* 603. *Jackson v. Van Valkenburgh*, 8 *Conn.* 260.

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between them, and was never registered as a mortgage. That on the 27th of *July*, 1810, a *writing, bearing date on that day, was made and executed under the hands and seals of *M. Ward* and the appellant, reciting that *M. and W. Ward* were indebted to the appellant in the sum of 10,000 dollars, on three promissory notes, payable six months after date, and dated respectively the 24th, 25th, and 26th of *July*, 1810; the conveyance from *M. Ward* to the appellant, that *M. and W. Ward* had deposited with the appellant certain notes of *R. Bache and Co.*, and declaring that if the notes of *M. and W. Ward* should be regularly paid, the conveyance and the notes of *R. B. and Co.* should be given up, otherwise they were to remain as security, and the appellant might sell the lots and collect the money on *B. and Co.*'s notes; but this writing was never registered. That on the 17th and 25th of *June*, 1811, *M. and W. Ward* made and delivered to the appellant their other notes, each for 3,333 dollars and 33 cents, and which were received by his agent, *M. B. Edgar*, on account of the notes given by them in *July*, 1810, but the latter notes were still retained by the appellant; that at the same time they paid the appellant the interest due thereon, and, in addition thereto, a large sum, by way of usury, on the substituted notes, which last, when they fell due, were taken up by the respondent. The bill further stated, that *M. and W. Ward*, by indenture of the 11th of *May*, 1812, conveyed and assigned to the respondent all their estate, real and personal, (except wearing apparel, household furniture, and certain specified debts,) in trust for the benefit of their creditors, and a part of the property so conveyed was the right and interest of *M. Ward* in the fifty lots contained in the deed to the appellant and that, afterwards, by a deed of the 16th of *November*, 1812, *M. Ward* executed another conveyance of those lots, upon the same trusts, for the more clear description of the said lots, and to confirm the title of the respondent therein; and that on the 19th of *November*, 1812, the respondent gave a written notice of the conveyance to the appellant, requesting him to give up his deed to be cancelled, to release his right in the land, and to give up the three promissory notes of *M. and W. Ward* to be cancelled. The bill further stated, that between the 27th of *January*, 1810, and the day of the date of the assignment from *M. and W. Ward* to the respondent, *M. and W. Ward* had various dealings with the appellant, by exchanging notes, upon which transactions the appellant, taking advantage of their necessities, extorted from them, under the name of commissions, or some other name, but in fact for usury and unlawful interest, contrary to the statute, 2,000 dollars or upwards, for which the appellant became and was accountable to *M. and W. Ward*, before and at the time they made the assignment of their estates in trust to the respondent, and for which the appellant, in consequence of that assignment, became accountable to the respondent. The bill prayed that the appellant might deliver up the said deed of the

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27th of *January*, 1810, and release to the respondent all pretence of right in the said fifty lots, and account with the respondent, for what the appellant had received for usury or unlawful interest from the said *M. and W. Ward*, as stated in the bill.

The appellant, in his answer in the Court below, denied that the deed from *M. Ward*, to him, was made on any usurious or illegal contract, or that the purposes of it were fulfilled on the 27th of *July*, 1810, or were yet fulfilled. The answer stated, that on the 27th of *January*, 1810, *M. and W. Ward* applied to the appellant to advance them three promissory notes for 10,000 dollars, payable six months after date, which he agreed to do, and accordingly advanced them three notes, each for an equal portion of that sum, dated the 24th, 25th, and 26th of *January*, 1810, payable six months after date respectively, whereupon *M. Ward* conveyed to the appellant the before-mentioned fifty lots, by a deed of that date, which was absolute in its terms, but was intended only as security for the notes so advanced; that on the 25th of *July*, 1810, *M. and W. Ward* applied to the appellant to renew the notes, which he did, by giving their notes for the same sums, dated the 26th, 27th, and 28th of *July*, payable in six months; and thereupon they gave the appellant their three notes, two for 3000 dollars each, and one for 4000 dollars, dated the 24th, 25th, and 26th of *July*, payable six months after date, left the deed in his hands, and also deposited with him three notes of *R. Bache and Co.*, of which two were for 1408 dollars 42 cents each, and the other 1408 dollars, 41 cents; that the difference in the *dates of the notes given by the appellant, and those taken from *M. and W. Ward*, in exchange, was to enable the appellant to collect the latter notes before his fell due, or to sell the fifty lots to raise the money; and that *M. and W. Ward* took up the notes which they had given to the appellant in *January*, and which he had lodged in the bank for collection; but that the notes given in *July*, being lodged for collection in the bank, were left unpaid, the *Wards* having previously failed, and were taken out of the bank by the appellant, and retained by him, with their consent. The appellant admitted that the deed of the 27th of *January*, 1810, was never registered as a mortgage, but that it was recorded as a deed, on the day it bears date; and also, that the defeasance had never been recorded. He stated, that after the notes of *M. and W. Ward*, given in *July*, 1810, had become payable, *M. Ward* proposed to the appellant, to raise for him, on his notes, 10,000 dollars, to put him in cash to that amount, and prevent a sale of the lots; in consequence of which *M. and W. Ward* gave to him three notes, one dated 25th of *May*, 1811, for 3333 dollars 33 cents, at sixty days, for which they received from him his note for the same amount, dated the 28th of *May*, at sixty days; another note, dated 12th of *June*, 1811, at ninety days, for 3333 dollars 33 cents, for which they received his note for the same amount, dated the 15th of *June*, 1811; and a third

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note for 3333 dollars 33 cents, dated the 24th of *June*, at thirty days, which he received to meet his note given to them payable at five months from the 25th of *February*, then last; on which notes, money was raised by *M. Ward*, who gave the respondent the proceeds; but he denied that he received from them any notes of the 17th and 25th of *June*, as mentioned in the bill. He also alleged, that at the time the proposition to raise money on the respondent's notes was made, *M. Ward* agreed that the notes given in *July*, 1810, should be retained by the respondent, until the lots should be sold, or the loan or debt discharged, because they corresponded with the notes described in the defeasance, and the deed and defeasance were also to remain in force till the debt was paid; but he denied that the notes of the 25th of *May*, 12th and 24th of *June*, 1811, were *given by the *Wards*, or received by the respondent, in lieu of the notes of *July*, 1810, on which latter notes they paid all the interest that had accrued; and he admitted that the notes given by *M. and W. Ward*, in *May* and *June*, 1811, had been paid. He admitted that he had received from them commissions, varying from one half to two and a half per cent., but denied all extortion and usury.

The receipt before alluded to, signed by *M. B. Edgar*, was in the following terms:—

“*New-York, June 17th, 1811. Received from M. and W. Ward, their two notes, viz. 25th May, sixty days, thirty-three hundred and thirty-three $\frac{33}{100}$ dollars. 12 June, 90 days, same amount, being on account of their three notes, 24, 25, 26 July, 1810, at 6 ms., for 10,000. D. Dunham, p. M. B. Edgar.*”

On the back of the receipt there was this endorsement: “25 *June*, received note 30 days, \$3333 33. *M. B. Edgar.*”

The assignment of the 11th *May*, 1812, from *M. and W. Ward*, to the respondent, contained a grant of “all the estate and property of the said *Matthias Ward* and *William Ward*, either joint or several, and both real and personal, and whether in possession, reversion or remainder, (the wearing apparel and household furniture of the parties respectively excepted,) and the several debts and demands due to the said *Matthias Ward* and *William Ward*, either jointly or severally, whether mentioned and described in the schedule hereto annexed, marked B. or otherwise, and more particularly the stock in trade, now in the house called the *City Hotel*, in the said city of *New-York*, or the wareroom in the rear of the same. To have and to hold, &c.” In the schedule referred to, there was the following clause:—“Lots of ground in *Stuart street*, the title to which is in name of *David Dunham*, given as collateral security to pay certain notes.” The deed of conveyance of those lots, of the 16th *November*, 1812, from *M. Ward*, to the respondent, referred to the description of them as given in the schedule to the assignment

The testimony in the Court below, taken on the part of the respondent, fully established the fact, that a commission *of two and a half per cent. had been received by *Dunham* from the *Wards*, on the several exchanges of notes before mentioned. The transaction, however, was not regarded by the chancellor as usurious, who did not notice it in his decree, but ordered a conveyance of the lots in question to be executed by the appellant to the respondent, and that the appellant pay the costs of suit. For the decree of the chancellor, and the reasons on which it was founded, see 2 *Johns. Ch. Rep.* 188—196.

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T. A. Emmet, for the appellant, contended, that the question of usury could not be discussed on the present appeal. If the respondent considered the decree of the chancellor erroneous in that respect, he might have entered a cross appeal, and thus brought the subject before the court; but, not having done so, all discussion must be confined to the other points on which it has been sought to invalidate the deed from *Ward* to the appellant.

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The deed of the 27th of *January*, 1810, was an absolute conveyance, and vested an absolute title in the appellant: it was not until the following *July*, that a defeasance was executed, and, consequently, in all the intermediate time, it could have been recorded no otherwise than as a deed. Had the execution of the conveyance and the defeasance been simultaneous, they would have been, in fact, but one and the same disposition of the property, and no more than equivalent to a single instrument, containing both a grant and the condition on which the estate of the grantee was to be divested, and the transaction could be regarded no otherwise than as a mortgage. (*Powell on Mort.* 6, 7.) But where the defeasance, as in this case, is subsequently executed, it cannot vary the nature of the original deed, as between the parties themselves. It is an agreement, or trust, which may be enforced; but, as to third persons, the deed continued an absolute conveyance; nor does it, as the chancellor supposed, relate back to the original deed: the law gives it no such relation, (*Cotterell v. Purchase, Cases temp. Talb.* 61.) and the parties themselves never intended it to be retrospective. The instrument, on the face of it, was only prospective: the appellant might have sold and conveyed an absolute and irredeemable estate, and it was in the contemplation of the parties, that he should have that power. There was no actual possession of the lots, and the law will, of course, deem the possession to be in him who has title.

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The respondent was not a *bona fide* purchaser. Indeed, it nowhere appears, except in the schedule of the assignment from *M. and W. Ward* to him, that he was a creditor; and that assignment and schedule are not evidence against the appellant; but if he were a purchaser for valuable consideration, he is not, therefore, necessarily, a *bona fide* purchaser. As a trustee, for

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the payment of debts, he is not a purchaser for valuable consideration: he paid nothing. The statute means a purchaser, in the common and vulgar sense, one who lays out his money; and admitting that the deed and defeasance may be coupled, and make parts of one transaction, as he was affected with notice, he was not a *bona fide* purchaser. The schedule to the deed of assignment itself, was full intimation of the appellant's claim; for it states expressly, that the title to the lots in question was in the name of the appellant, and that it was given to him as collateral security to pay certain notes.

Where a person takes a conveyance of the legal estate, with notice of a prior right, he is guilty of a fraud, (*Le Neve v. Le Neve*, 3 Atk. 646. S. C. Ambl. 436. 1 Ves. 64. Burr. Rep. 474, per Lord Mansfield. *Jackson d. Humphrey and others, v. Given and others*, 8 Johns. Rep. 137. *Jackson d. Livingston and others, v. Neely*, 10 Johns. Rep. 374.) and cannot gain a priority by having his deed recorded. It is true, that Lord Hardwicke, in *Hine v. Dodd*, (2 Atk. 276.) says, that "suspicion of notice, though a strong suspicion, is not sufficient to justify the Court in breaking in upon an act of Parliament;" but he previously admits, "that apparent fraud, or clear and undoubted notice, would be a proper ground for relief." The master of the rolls, therefore, in *Jolland v. Stainbridge*, (3 Ves. 478.) was certainly not warranted in asserting, that Lord Hardwicke, in *Hine v. Dodd*, said, that "nothing short of actual fraud will do." Besides, in *Hine v. Dodd*, the defendant denied notice, and there was but a single witness to fix it upon him: this alone was a sufficient ground for dismissing *the bill, and it was unnecessary to go into any further inquiry. *Newland*, in his treatise on contracts, p. 510, observes, that "Lord Hardwicke did not mean to say, that it was necessary to make out a case of actual fraud, as distinguished from the fraud which equity imports, to a person purchasing with notice of a prior title, and endeavoring to defeat it by obtaining the legal estate, in order to admit evidence in the case alluded to. Lord Hardwicke plainly distinguishes between one species of fraud and the other, and admits, that in either case relief would be given." "The intention of the act," says Mr. Sugden, (*Law of Vendors and Purchasers*, 471.) "was to secure subsequent purchasers and mortgagors against prior secret conveyances and fraudulent encumbrances; and, therefore, where a person has notice of a prior conveyance, it is not a secret conveyance by which he can be prejudiced; for he can be in no danger, where he knows of another encumbrance; because he might then have stopped his hand from proceeding, and, therefore, is not a person whom the statutes meant to relieve." If by *suspicion of notice*, be meant, what is sufficient to put the party upon inquiry, that, Lord Hardwicke has himself said, is good notice in equity; (*Smith v. Low*, 1 Atk. 490.) and in *Le Neve v. Le Neve*, (3 Atk. 646.) he proceeds, throughout, on the ground,

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that the taking a conveyance with notice of a prior right, makes a person a *mala fide* purchaser, and he decides, that notice to the agent was sufficient to affect the principal. This case, certainly, went far beyond the narrow rule laid down in *Hine v. Dold*. If a man purchases the fee in land under a lease, and is informed of the existence of the lease, is there not sufficient to put him upon inquiry, and must he not be bound by all the stipulations and covenants which it contains? (*Taylor v. Sibbert*, 2 Ves. jun. 437.) The respondent, in the case before the Court, was apprized of the existence of the appellant's deed. He had sufficient to put him upon inquiry; and he cannot protect himself by alleging the want of that knowledge, which it was his duty to acquire.

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The facts of the case show, that the notes given by the *Wards*, in July, 1810, have always remained outstanding and unsatisfied. Such is the allegation of the answer, and there is nothing to repel it, but an inference drawn from an obscure expression in *Elgar's* receipt. If the respondent's objections to the deed of the 27th of January, 1810, are well founded, he has an adequate remedy at law; and the decree of the chancellor was incorrect, in ordering the deed to be delivered up to be cancelled, for it contains covenants which ought not to be released, and which no insolvency would sweep away.

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Riggs and *S. Jones, jun.* contra. The question of usury is open for discussion in this Court, which, on an appeal from chancery, will hear and decide on the whole merits of the case, and finally settle all the matters in controversy between the parties. (*Le Guen v. Gouveneur and Kemble*, 1 Johns. Cas. 436. *MP Vickar and others v. Wolcott and others*, 4 Johns. Rep. 510.) It is the settled practice of the Court of Appeals in *Virginia*, to correct an error to the injury of the respondent, although he has not appealed from it. (*Day v. Murdock*, 1 Munford, 460.) A similar practice is adopted in the Court of Chancery, where, on a rehearing, although the party petitioning is restricted to the specific objects of his petition, yet the whole case is open to his adversary.

The notes, for the securing the payment of which the mortgage was given, were usurious; or, if not usurious, there was extortion, and an undue advantage taken of the situation and necessity of the *Wards*. The amount of interest received, or stipulated to be received, upon the various transactions between them and the appellant, exceeds the legal rate of seven per cent.; and it is in vain to attempt to shelter it under the name of commissions. A creditor is not allowed to make it a condition of the loan, that he should receive a compensation for his services in procuring the money; for it tends, most manifestly, as was observed by the chancellor in another case, to oppression and usury, if it is not usury in itself. (*Hine v. Handy*, 1 Johns. Ch. Rep. 6.) And in a case between these

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same parties, the Supreme Court determined, that the taking two and a half per cent., in the exchange of the appellant's notes, with the notes of the *Wards*, under the name of commission, *was usurious, the commission, in fact, amounting to more than legal interest. (*Dunham v. Dey*, 13 *Johns. Rep.* 40.) The bill contains a sufficient charge under which to introduce the question.

It is objected, that the respondent has an adequate remedy at law, as regards the deed of *January*, 1810. But where a Court of Equity has jurisdiction of part of a subject, it may take cognizance of all the matters connected with it, although strictly of a legal nature; and the exception can be taken no otherwise than by demurrer. (*Ludlow v. Simond*, 2 *Caines's Cas. in Error*, 1.) Besides, a Court of law could not, in this instance, have given the requisite relief: it could not have directed the deed to have been delivered up, which is one of the principal objects of the decree.

The next question is, Was this instrument a mortgage? Upon the face of it was an absolute conveyance; but in fact, and so the answer admits, it was merely a collateral security; it was conditional and defeasible, although the defeasance was by parol; and after the execution of the written defeasance, in *July*, 1810, it clearly became a mortgage. There is no necessity that the two instruments should be simultaneous, where the conveyance derives its effect from the statute of uses, and not from livery of seisin. Being a mortgage, it must be registered as such. As between the parties themselves, every mortgage is a trust; but when the rights of third persons are involved, it is no more than a mortgage, and their respective claims are to be decided by the provisions of the act concerning mortgages, which does not require the recording of a trust.

If, then, the transaction be established as a mortgage, the inquiry remains, whether the respondent was a *bona fide* mortgagee; although the objection comes with an ill grace from the appellant. He who charges fraud against another must himself be free from all imputation; yet the deed, which is the basis of the appellant's title, asserts a falsehood; it pretends to be an absolute, when it is only a defeasible, conveyance; and the falsity of an instrument is sufficient to destroy its efficacy. (2 *Sch. and Lefroy*, 501.) But admitting it to be available to any intent, notice, at least actual notice, (for the law, in cases of this description, *regards no other.) (1 *Madd. Ch.* 260, 261.) is not brought home to the party. The rule laid down by the chancellor, in the Court below, as the result of the numerous decisions upon the subject, is undoubtedly correct, that there must be actual fraud; and although there may be cases in which notice divested of fraud has been held sufficient, yet the proof must be extremely clear. No other principle can be deduced from the opinion of Lord *Hardwicke* in *Le Neve v. Le Neve*, and there is nothing to be found in

Newland or *Sugden*, which in the least impugns the doctrine; and it is confirmed by all the decisions on the subject that have occurred in the Supreme Court. (*Jackson, d. Bonnell and others, v. Sharp*, 9 Johns. Rep. 163. *Jackson, d. Humphrey and others, v. Given and others*, 8 Johns. Rep. 137. *Jackson, d. Bonnell and another, v. Wheeler*, 10 Johns. Rep. 165. *Jackson, d. Gilbert, v. Burgott*, 10 Johns. Rep. 457.) But in this case, the notice arising from the schedule was lame and defective. The act concerning mortgages (sess. 36. c. 32. § 3. 1 N. R. L. 373.) (a) makes it indispensable that the defeasance should be registered with the deed, at all events, and no question can occur as to notice. If, however, the case falls within the second section of the act, still there must be actual notice: a mere implied or constructive notice is not sufficient. The cases cited by the opposite counsel, in support of his position, are inapplicable: they are not cases arising under the registry act, which makes this a question not of fraud, but of diligence.

The notes, for securing which the deed was given, were taken up by other notes, which were afterwards paid, and, therefore, the condition having been performed, all the appellant's title under it ceased. If there were other notes outstanding, it was incumbent on the appellant to produce them. As his dealings with the *Wards* were multifarious, there may possibly have been other notes; but if so, they are not traced to, and connected with, the first notes of July, 1810, for which the security was given.

T. A. Enmet, in reply. It is an acknowledged rule, that an appeal must state the grievance; otherwise there can be no issue on the point, and the opposite party would be *taken by surprise. The reason of the rule equally applies to the case of a respondent, who should not be allowed to introduce his own complaint, without giving notice to his adversary by a cross appeal. Nor is the practice analogous to a rehearing; for a rehearing is, to almost every purpose, an original bill, under which new exhibits and new matter may be introduced. If the decree be silent as to usury, there is nothing from which the party can appeal.

But how would the respondent have stood, supposing a cross appeal had been filed? He is not entitled to an account, for the *Wards* are not parties, which was particularly requisite here under the circumstances of the case. An assignor must be party to a bill in relation to the subject of the assignment. (*Ray v. Fenwick*, 3 Bro. Ch. Cas. 25. *Cathcart v. Lewis*, 1 Ves. jun. 463. *Coop. Eq. Plead.* 34. In opposition to this principle, *Riggs* cited *Clute v. Robinson*, 2 Johns. Rep. 595, in which a bill of foreclosure was filed by the assignee of a mortgage, without making the mortgagee party.) The bill is too vague as to any specific account; and, besides, the respondent does not

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offer to pay the balance, if found against him; nor is there any person before the Court who can be compelled to satisfy the appellant for what may be found due to him, on taking an account. The respondent is not entitled to it on the ground of usury, as he has not offered to pay what may be actually due.

The mortgage act has no reference to a parol defeasance, and there is no case to be found, in which it has been held, that a parol understanding would make an absolute deed a mortgage. Had *Ward* filed a bill against the appellant, he could not have been compelled to answer as to the parol agreement: he might have pleaded the statute of frauds, or even admitted the fact, and still insisted on the statute. By the defeasance, the deed is not converted into a mortgage, but it raises a trust. It was subsequent in point of time; and to constitute a mortgage, the condition of redemption must enter into the contract, in its first formation. It was, therefore, not necessary that the deed should have been registered as a mortgage. The priority given by the act relates only to mortgagees, and not to purchasers.

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*As to the question of notice, it is said by *Maddock*, (1 *Madd. Ch.* 261.) that it may be proved by parol evidence. In the present case, the notice was all in writing, and it cannot be presumed, nor will the respondent be permitted to suggest, that he never read his deed. A recital is notice. (*Cuyler v. Bradt*, 2 *Caines's Cas. in Error*, 326.) The schedule to this deed must be taken as if incorporated with it, and by it the respondent must have learnt that the legal title was in the appellant; it was not only notice that he held the legal title, but it was notice of the quantity of interest vested in him, and that *Ward* could only have intended to convey an equitable estate to the respondent. The second deed was not designed for a mere particular description of the premises, but is a confirmation of the title, and, therefore, it shows that the first was defective.

PLATT, J. The object of the respondent's bill was to vacate and cancel the title of *David Dunham*, on three grounds; 1st. That the debt for which the lots were pledged to *Dunham*, had been paid; 2dly. That the deed to *Dunham* was in violation of the statute against usury, and, therefore, void; and, 3dly. That the conveyance to *Dunham* was not registered as a mortgage, pursuant to the statute; and, therefore, it cannot defeat or prejudice the subsequent conveyance to *Dey*.

The payment, and the usury charged in the bill, are denied in the answer. Whether the chancellor has properly decided that the evidence does not support the allegation of usury, is a question which does not necessarily arise; because the bill is not framed or adapted for relief on the ground of usury. The complainant does not ask to redeem by paying the money actually lent, with interest. If that were his object, there never would have been any disagreement between the parties.

The course of reasoning pursued by the chancellor did not

require him to examine the question of *payment*; and he, therefore, expressed no opinion on that point.

According to my view of the case, the allegation that the debt to *Dunham* has been paid, is not well founded. The repeated renewal of the notes, which were the evidence of *that debt, is to be regarded as an extension of the credit, from time to time; but ought not to be deemed an extinguishment or satisfaction of the original debt, for which the conveyance to *Dunham* was given as security.

This renders it necessary to examine whether the statute concerning mortgages, as applicable to this case, required the registry of the conveyance to *Dunham*, as a mortgage, in order to preserve his lien against the subsequent deed to *Dey*.

The provision of the statute is, "that no mortgage, nor any deed, conveyance, or writing, in the nature of a mortgage, shall defeat or prejudice the title or interest of any *bona fide* purchaser of any lands, tenements, or hereditaments, unless the same shall have been duly registered," &c. Before this statute, mortgages gained preference, and took effect as *liens*, both at law and in equity, according to their true dates, independent of any notice, either actual or constructive. The unregistered mortgage to *Dunham*, in this case, is prior in date; and assuming that it was originally a valid security, it remains to inquire, whether the statute has deprived him of his prior *lien*? The statute annuls a prior unregistered mortgage, in one case only; and that is, in favor of a subsequent "*bona fide* purchaser." The only question, then, is, whether *Dey*, claiming to defeat the security of *Dunham*, is to be regarded as a "*bona fide* purchaser," in the true sense of the statute. I incline to the opinion, that he is not. By a "*bona fide* purchaser," I understand the statute to mean, a person who buys without knowledge of the prior mortgage, and who would, in fact, be defrauded, if such prior encumbrance were to stand in opposition to his title. The manifest object of the statute was to protect purchasers against prior secret conveyances, of which such subsequent purchasers had no notice.

I cannot suppose that the legislature intended to favor, much less to give priority to, a purchaser who buys with notice of a prior unregistered mortgage, and with intention to defeat it, by taking advantage of the *laches* or inadvertence of the prior mortgagee. Notice supersedes registry, because it effects the same object, which is to apprise *the purchaser of the prior encumbrance. An unregistered mortgage is valid between the mortgagor and mortgagee; and whoever takes a conveyance with intent to invalidate such security, is not a *bona fide* purchaser, but voluntarily aids in defrauding the mortgagee.

What degree of particularity or certainty in the notice, is necessary to affect the purchaser, and supersede registry, it is often difficult to decide. In the case of *Hine v. Dodd*, (2 Atk. 275.) Lord Hardwicke says, "The register act is notice to every

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body; and the meaning of this statute was to prevent *parol* proof of notice, or no notice." He admits, "there are cases where the Court has broken in upon this" rule; but insists, "it was in cases of fraud." His lordship then observes, "There may possibly have been cases, upon notice, divested of fraud; but then the proof must be extremely clear." The luminous mind of that great man seldom evinced such a want of precision and perspicuity, as in the opinion which I have quoted. It would, perhaps, have been more correct to say, that where the proof of notice is clear and certain, it is, *per se*, evidence of fraud in him who attempts to defeat a prior encumbrance, by setting up a subsequent deed. In this case, the notice of the mortgage was not particular as to the date, or sum, or time of payment; but the purchaser was expressly notified in writing by *Ward*, the grantor, that "the title of the land was in *David Dunham*, as collateral security, to pay certain notes." The notice was not only in writing, but contained in a schedule annexed to, and forming part of, the deed, under which the purchaser claims. It must receive the same construction as if it had been incorporated into the body of the deed. Suppose, then, the grant had been in this form: I, *Matthias Ward*, grant, bargain, and sell, to *Anthony Dey*, and his heirs, all my "estate and property in the lots in *Stewart street*, the title to which is in the name of *David Dunham*, given as collateral security to pay certain notes;" would such a transposition of the same words, from the schedule to the body of the deed, make any difference in the construction of the whole instrument? I think not; and if so, then the purchaser not only had express notice of the mortgage to *Dunham*, but the very deed itself purported *to convey no more than a mere undefined equitable interest in those lots, subject to the prior legal and equitable title to *Dunham*. The deed contained a reference to *Dunham's* title, not merely in regard to the sum for which the lots were pledged, and when payable, but also for the designation and description of the lots themselves; for without examining the title of *Dunham*, it is impossible to ascertain what lands were meant to be conveyed to *Dey*. The only description of the premises granted by that deed, is contained in the schedule: the deed did not in its terms profess to convey to *Dey* the entire estate in those lands, but merely such portion of equitable interest as remained in *Ward*, after mortgaging them to *Dunham*; or, in other words, the conveyance to *Dey* expressed no more than an assignment of the equity of redemption.

Ward, in this case, so far from deceiving *Dey*, by pretending to convey to him an estate, of which he had before divested himself, expressly informed *Dey* that he had no legal estate in these lots; for that the title was in *David Dunham*. *Dey* then knew that he purchased no more than the equitable interest of *Ward*, subject to the lien of *Dunham*, whatever that might be; and the fair construction of the transaction is, that *Dey* volun-

tarily took upon himself to investigate the title of *Dunham*, and to ascertain the extent of his lien, so that he might redeem the lots, if he thought proper, for the benefit of the creditors whom he represented.

I do not find it necessary to impugn or to question the decisions in *Hine v. Dodd*, (1 *Atk.* 275.) *Jolland v. Stainbridge*, (3 *Vesey, jun.*, 478.) or any others cited by the counsel for the respondent. In the case of *Le Neve v. Le Neve*, (3 *Atk.* 646.) Lord *Hardwicke* said, "It would be a most mischievous thing, if a person, taking the advantage of the legal form appointed by an act of Parliament, might, under that, protect himself against a person who had a prior equity, of which he had notice." In the case of *Jackson v. Neely*, (10 *Johns. Rep.* 374.) and several others, in our own Courts, the same construction of our registering and recording statutes has been sanctioned.

The decree of his honor the chancellor, in setting aside *the conveyance to *Dunham*, is, therefore, in my judgment, erroneous. and ought to be reversed.

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This being the unanimous opinion of the Court, it was thereupon ORDERED, ADJUDGED, and DECREED, that the decree of the Court of Chancery be reversed; that the respondent's bill be dismissed; and that he pay to the appellant his costs in the Court of Chancery, to be taxed; and that the record be remitted, &c.

Decree of reversal. (a)

(a) The only point determined in the Court below, declared to be erroneous by the above decree, is as to the sufficiency of the notice to the respondent of the prior deed to the appellant, the defeasance of which was not recorded, at the time of the assignment to the respondent in trust.

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against

CALEB S. RIGGS, SAMUEL WARD, and CHARLES M'EVERS, JUN., assignees of Robert Murray, a bankrupt, respondents.

A debtor in insolvent circumstances [* 572] may lawfully prefer one creditor, or set of creditors, to another.

A, on the 23d of March, 1798, assigned property to B, in trust to pay B. and other creditors, with power of revocation, and to appoint new trust; and on the 24th of March, 1798, the 21st of March, 1799, and the 22d of March, 1799, executed other assignments to B., all in relation to the same subject, and all reserving a like power; and on the 31st of May, 1800, executed an irrevocable deed to B. in trust. The

late bankrupt law of the United States afterwards came into operation, and A. was declared a bankrupt. His assignees filed a bill against B., to set aside the several assignments, and to account for the property received by him. *Held*, that although the revocable deeds might have been avoided by a person previously obtaining a title from A., yet that the deed of 1800 was valid, and might be taken in connection with the first deed, and the other deeds might be laid out of the question, and, therefore, that the assignees under the bankrupt law, whose title subsequently accrued, could not impeach it; and that, taking all the deeds together as parts of one transaction, the four first could only be regarded as voidable by creditors, and no rights of creditors having intervened, they were capable of confirmation, and were, in fact, confirmed by the deed of 1800. (a)

A deed fraudulent in fact is void, and incapable of confirmation; but a deed constructively fraudulent, as being contrary to the policy or provisions of a particular statute, is voidable only, and may be confirmed by matter *ex post facto*.

An assignment of property in trust, by a debtor, with power of revocation, is fraudulent only as regards judgment creditors, or such as are taking measures to obtain payment of their debts.

A reservation in an assignment in trust for the payment of debts, of a sum for the maintenance of the assignors, does not render the assignment void; though in case of a deficiency, the creditors are entitled to have the part reserved applied in satisfaction of their debts.

When there are mutual dealings between A and B., and A. having property of B. in his hands, B. becomes a bankrupt, A. is entitled to set off his debts or demands against the funds in his possession, and can only be compelled to account to the assignees of B. for the balance; even though the subject of the set-off would not be admissible at law. (b)

(a) Vide *Sturson v. Brown*, 7 Cow. Rep. 732. *Bailey v. Burton*, 8 Wendell's Rep. 339. *Macie v. Clark*, 5 Cow. Rep. 517. 2 Johns. Ch. Rep. 565. 580.

(b) Vide *Ogden v. Copley*, 2 Johns. Rep. 274.

such times, and in such proportions, and on such terms and conditions as they by such deed should direct, and in default of such direction, then in trust for the grantors, and further with power to change the trustees, &c.

On the 24th of *March*, 1798, the grantors, by deed, reciting the former deed, appointed and directed the grantees, to pay out of the property assigned the expenses of the trust, and to retain and pay to themselves, and for divers other purposes, therein particularly specified, several sums of money therein specified; reserving, however, to the grantors, a power by deed, at any time before a complete adjustment of the trust, within one year, to alter or revoke the appointments.

On the 21st of *March*, 1799, the grantors, by deed, revoked and annulled the appointments and trusts of the deed of the 21th of *March*, 1798, and appointed and appropriated *the property before assigned to the payment of the charges of the trust, and to the payment of the trustees and certain other specified creditors, such sums and in such proportions of the moneys due them respectively as the grantors should thereafter, by deed, direct and appoint.

On the 22d of *March*, 1799, the grantors, by deed, referring to the former assignment, directed the trustees to pay out of the property assigned the expenses of the trust, and to pay themselves and divers other creditors, therein mentioned, the sums due to them, at the times, in the proportions, and upon the terms and conditions, therein expressed; reserving the right and power in the grantors, by deed, at any time before a complete and final adjustment, to alter or revoke all, or any, of the said appointments and directions, and to make and declare any new appointments or trusts, at their pleasure.

On the 31st of *May*, 1800, the grantors, by deed, referred to and partly recited the former deeds of the 23d of *March*, 1798, and 22d of *March*, 1799, and recited further, that the grantors were desirous to alter the appointments made by the last of those deeds, and to make other and further appointments and directions: they did, therefore, by virtue of the power to them reserved, order and appoint, that out of the proceeds of the property assigned, the trustees should pay, (1.) all expenses incurred: (2.) towards the support of the grantors from the 23th of *March*, 1798, until they should be respectively discharged from their debts, or until one year after they should be discharged by law, a sum not exceeding 2,000 dollars a year, for each of the grantors: (3.) to pay certain creditors named: (4.) to pay themselves certain specified debts: (5.) to pay other debts due to the trustees, and several other creditors therein mentioned, on a due liquidation, &c.: and generally to pay all persons who were or should be bail for the grantors, or either of them: (6.) that the assignees should make a final settlement with the creditors last mentioned, on certain terms mentioned, and that the assignees should hold the balance of trust property,

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subject to the further order of the grantors, and that the creditors who should not, in one year, accept of the conditions, or *should knowingly embarrass the objects aforesaid, should be forever excluded from any share under the assignment.

A separate commission of bankruptcy was issued on the 15th of June, 1801, against *Robert Murray*, who was then, and since 1796, had been in confinement for debt, and on the 2d of July his property was assigned to the plaintiffs. The respondents, in their bill, besides *Murray* and *Clark*, the trustees, also made the grantors defendants. In their bill they charged that *Robert Murray* did business in *New-York*, and that the other partners went abroad to *Europe* to avoid and defraud their creditors. That *Robert Murray*, partner, had contracted debts to upwards of 700,000 dollars; that the assignment of 1798 was fraudulent, and made to delay, hinder and defraud the creditors. The bill further charged, that the private property of *Robert Murray*, exclusive of his share in the partnership property, was very inconsiderable, and the bill prayed that the trustees might come to an account with the respondents for all moneys received belonging to the partnership estate, and that they might be directed to deliver up all books, vouchers and papers belonging to the estate, or firm, and that they might pay to the respondents what they were entitled to receive as assignees, and might assign and deliver over all securities, &c., and that the several assignments to the trustees might be declared fraudulent and void.

To this bill *Robert Murray*, *George W. Murray*, and *John R. Wheaton*, answered generally, setting forth their bankruptcy and discharge under the bankrupt act of the *United States*.

The answer of *John B. Murray*, admitted the several deeds of assignment and appointment, but denied fraud in any of the transactions. It stated, that within one year from the date of the last deed, certain creditors therein named, and the trustees themselves, did agree and assent to the terms expressed; that the four first deeds were delivered to the defendant *Clark*, and were afterwards mislaid or lost; that *Robert Murray* acted as agent for the trustees, in several matters relating to the trust; that the property assigned was greatly deficient in paying the *debts covered by the assignments; and that *James V. Murray*, one of the partners, claimed the funds received by the trustees, and had filed his bill for that purpose. The amount received was stated, and the appellant submitted to account and pay the balance, if any, &c.

Clark, having put in a similar answer, died, and the suit was revived against his executors; and in 1809, a settlement took place between the respondents and the executors of *Clark*, with the assent of *John B. Murray*, and of all other parties whose assent was deemed necessary, and a rule was entered by consent, whereby it was ordered that the executors were to retain all sums of money secured by the deeds of assignment

to *Clark*, with interest and costs, and to pay the balance that might remain of the money received by him, in certain lands, at a valuation as therein mentioned, and that *Clark's* estate should, thereupon, be discharged; but the respondents were not thereby to be precluded from litigating the validity of the assignments, as to other purposes; but in case the deeds were valid as to all or any of the trusts therein mentioned, then the funds were to be applied, after payment of expenses, in the first place, to pay the amount due to the appellant, and his late copartner, *Mumford*. In pursuance of this order, an account was taken of the sums received by, and due to *Clark*, and the executors conveyed to the assistant register of the Court of Chancery lands, valued at 72,328 dollars and 55 cents, and paid the respondents 6,000 dollars in cash, making together 78,328 dollars and 55 cents, being the balance found to be due from *Clark*.

The cause, as to *John B. Murray*, proceeded to issue and publication, but no witnesses were examined on either side; and on the 16th of *October*, 1812, a rule was entered by consent, referring it to a master to take an account of the moneys received by the defendant *John B. Murray*, as trustee aforesaid, and of the sums paid or retained by him, and which ought to be allowed him, in pursuance of the deeds of trust, and the particulars of such receipts, payments and allowances, and that all questions be reserved.

The master reported, on the 1st of *July*, 1816, that he had been attended by both parties, and that the appellant had *received under the trust 81,836 dollars and 99 cents, after deducting all charges and commissions which accrued thereon; that there was due to him, and to the firm of *Murray and Mumford*, under the assignment, after crediting all he had received for principal and interest, on the 1st of *September*, 1814, the sum of 95,688 dollars and 25 cents, and which, with interest to the date of the report, amounted to 102,548 dollars.

The cause came on to a hearing before the chancellor in *June* term, 1817, on the equity reserved, the exception of the respondents to the master's report, on the ground that *John B. Murray*, and *Murray and Mumford*, did not appear, by any thing in evidence before the master, to be entitled to be paid out of the property assigned, and also upon a petition to the appellant, stating his rights under the assignment, and the history of the cause, and praying for an order that the respondents pay to him the 6,000 dollars, received by them from the executors of *Clark*, and that the lands conveyed to the assistant register might be conveyed to him or sold, and the proceeds be paid to him, and that such sale be at the expense of the respondents, if they wish a sale, and the funds should eventually prove deficient.

On the 30th of *September*, 1817, the chancellor made his decree, denying the petition of the appellant, and ordering that the appellant should pay to the respondents the sum of 81,836

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dollars and 97 cents, which, it appeared from the master's report, he had received under the assignments and deeds in 'he pleadings mentioned, with interest thereon, from the date of the master's report, and costs of suit; and the several assignments and deeds of trusts, in the pleadings mentioned. were thereby declared null and void.

From this decree an appeal was entered; during the pendency of which, and before it was brought to a hearing in this Court, the respondents, on the 8th of *December*, petitioned the chancellor for leave to tax their costs, and also to issue execution for the sum decreed to be paid to them, notwithstanding the appeal, unless the appellant should, within twenty days, pay the principal, interest and costs into Court, or give security, to be approved by a master. The petition was substantially granted, and an order made in conformity, *and from this order an appeal was likewise entered; but as the decision of the Court rested entirely on the merits of the case, it will be unnecessary to take any further notice of the second appeal. For the reasons assigned by the chancellor for his decree, see 2 *Johns. Ch. Rep.* 572; and for the reasons of the order on which the second appeal was brought, see 3 *Johns. Ch. Rep.* 160.

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S. Jones, jun., for the appellant, contended, that the deed of the 23d of *March*, 1798, was not void, and that the effect of a power of appointment or revocation was not to render it void, either at common law, or under the statute of frauds, which applies only to conveyances of land, where *bona fide* purchasers are concerned; but this is not a conveyance of land, nor are the respondents *bona fide* purchasers. Besides, after the time limited for the revocation, it was certainly valid; and it was not a voluntary conveyance, but founded on valuable consideration. (*Sugd. Vend.* 242. *Cro. Jac.* 180. 454. *Powel on Powers*, 316. *Prec. Ch.* 310. *Rob. Fr. Conv.* 432.)

At all events, the deed of the 31st of *May*, 1800, is good. It is denied that that deed must necessarily be taken in connection with the former deeds; but it may be regarded as a separate and independent transaction, and is uncontaminated, even admitting that they were infected with fraud. The provision limiting the surplus to the grantors, is no more than the law would itself have implied. The creditors have come in, and accepted the terms prescribed in the deed. By this deed, the power of revocation and of appointment, originally reserved, have been executed; new trusts were limited, and no new power of revocation being reserved, the trusts became irrevocable. (*Hele v. Bond, Prec. Ch.* 474. *Zouch v. Woolston, Burr. Rep.* 1136. 2 *Ves.* 77. 211. 2 *Fonbl. Tr. Eq.* 156. n. *Digge's Case*, 1 *Rep.* 174. *Comp.* 651.) Admitting, however, that the deed of 1800 must be coupled with the prior assignments, yet, as it is irrevocable, the great objection ceases.

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The deed of 1800 is not void by the statute of frauds; or if it were, it is not competent for the respondents to raise the question. No one can take advantage of the statute *but a judgment creditor, and that only during the time that the deed is revocable. (1 *Ves. jun.* 160.) A deed, voluntary and voidable by the statute, may be confirmed and made valid by a subsequent consideration; (*Prodgers v. Langham*, 1 *Sid.* 133. *Sug. Vendors*, 436.) and marriage has been held a consideration available for this purpose. (*Sterry and Wife v. Arden and others*, 1 *Johns. Ch. Rep.* 261.) To make the deed void *ab initio*, there must be fraud in fact: constructive fraud is not sufficient. (2 *Wils.* 354. 4 *Johns. Rep.* 598, 599. 4 *East's Rep.* 1.) The bill in this case charges fraud, but it is denied in the answer; and as no evidence has been produced, the only proof of the allegation must be drawn from the deed itself.

The counsel, again, insisted on the validity of the first deed of 1793, and examined the cases cited by the chancellor. (*Lavender v. Blackstone*, 2 *Lev.* 146. *S. C.* 3 *Keb.* 526. *Tarbut v. Marbury*, 2 *Vern.* 510. *Estwick v. Caillaud*, 5 *Term Rep.* 420.) The grantor may reserve to himself a certain control over the property conveyed in trust, provided it be not done with a fraudulent intent; (1 *Atk.* 183. *Luckner v. Freeman*, *Free. Ch.* 105. *S. C. E7. Cas. Abr.* 149. *S. C. Freeman*, 236.) and this position is not contradicted by *Hyslop v. Clark*. (14 *Johns. Rep.* 453.) A deed may be void in part, and valid as to the residue: the voluntary part may be void, and still the parts intended for the benefit of creditors be good; (*Fermor's Case*, 3 *Rep.* 73. *Styles*, 423.) and the question will always be, whether the intention was to hinder or delay creditors or not. A preference given to some creditors over others, is not an evidence of fraud. The chancellor, although he questions the policy of allowing such preference, admits its legality; and, indeed, the point is indisputable. (*Holbird v. Anderson*, 5 *Term Rep.* 235. 8 *Term Rep.* 521. 4 *East's Rep.* 1. 1 *Atk.* 95. 154. 5 *Johns. Rep.* 335. 3 *Johns. Rep.* 71. 6 *Term Rep.* 152. 1 *Ves.* 230. *Small v. Oudley*, 2 *P. Wms.* 427. *Hendricks v. Robinson and others*, 2 *Johns. Ch. Rep.* 233. *Wilt v. Franklin*, 1 *Binney*, 502.) It is essential to mercantile credit: those persons who have the advantage of it are generally endorsers and sureties. The business creditor always makes a profit, which may be deemed *a premium for the risk that he runs of losing his debt. Not so the endorser: he derives no gain from the responsibility which he assumes. The counsel confidently hoped that the deed would not be set aside on this ground: there must be other circumstances to render it fraudulent; and, he again asserted, that, at all events, the deed of 1800 may stand alone, and is valid.

The grantors were the absolute owners of all their property: they might have sold and disposed of it as they pleased, and

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The respondents are stopped. They have affirmed the acts of the appellant: they seek an account, and can only claim the balance. Further, they have affirmed the deed itself, as far as respects *Clark*, and have settled with his representatives. They have submitted to a reference, and the reservation which they made does not open the door to them to question the validity of the deed. The order of reference was founded on the idea that it was valid. All the parties beneficially interested under the assignment are not before the Court; and it is not now too late to raise the objection. (8 *Bro. Prec. Ch.* 122. *Hickock v. Scribner*, 3 *Johns. Cas.* 311.)

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**Henry*, contra, contended, that there was actual fraud. *Robert Murray* was in confinement long before these assignments. *Robert Murray and Co.* were insolvent: some of the firm went to Europe in 1796, and the clandestine departure of *Wheaton* was admitted. The counsel also insisted on the absolute power of appointment and revocation reserved to the grantors, and contended that the deed of 1800 was made in reference to, and in fraud of, the bankrupt law, which immediately after came into operation. It was only an assignment of partnership property; and yet the joint fund was applied to the payment of individual debts, in subversion of an acknowledged principle of equity, that the partnership debts must first be paid; and in this light the assignment, on the face of it, was fraudulent. (4 *Ves.* 386. 2 *Johns. Rep.* 282. 1 *Cooke's Bank. Law*, 538.) In May, 1800, it was an *inchoate* deed: it was intended to give a preference to certain creditors; but the assent of those creditors was not obtained until 1801, when the bankrupt law was in full operation. Their assent, given at a subsequent period, when all preference between creditors was illegal, cannot be carried back, 452

to give effect to a deed evidently made to place the property of the grantors beyond the reach of the statute of bankruptcy. Relation shall never work a wrong or charge to a third person. Relation is a fiction of law, and *in fictione juris semper est equitas*. (C. Litt. 150. a. 2 Rep. 29. b. Cro. Car. 423.)

The deed was void under the statute of the 27th Eliz., which has been re-enacted here. (Sess. 10. ch. 44.) It contained a grant of land; and so, being void in part, was void *in toto*, at least as regards creditors. At common law, an instrument may be partially void, and good for the residue; but if part of it be made void by statute, the whole is bad. (13 Vin. Abr. 57. tit. *Faits*. 2 Sir T. Jones, 90, 91. Hob. 14. S. C. Moor, 856. S. C. Goltb. 212. Cro. Eliz. 529. 1 Mod. 35. Plowd. 68. 111. Ley. 79. 1 Bac. Abr. 541. 549. Carter, 229. 10 Rep. 100.) The counsel also insisted that the reservation in the deed of 1800, for the support of the assignors, rendered it void; and that, as the fact was known to the appellant, there was collusion on his part, which in equity is the same as fraud. (Coup. 434. 3 Atk. 757. 13 Vin. Abr. *57. tit. *Faits*, pl. 10, 11.) He denied that it was only competent for a judgment creditor to contest the validity of the deeds, and insisted that they had not been ratified by the settlement made with Clark. He contended, that the direction to pay individual creditors, under the circumstances of this case, made the assignment fraudulent. The coercive clause, held out *in terrorem* to the creditors, was a strong feature in the case to show, that it was the intention of the parties to keep the property locked up, until the assignors could avail themselves of the bankrupt law. Admitting that a debtor has a right to give a preference, yet it must be an absolute preference, a complete and indefeasible disposition of the property.

The appellant is not entitled to a set-off against the funds in his hands. (4 Term Rep. 211.) Where the assignees affirm the contract of a bankrupt, the right of set-off may be claimed; but where they disaffirm his contract, as by bringing trover, instead of *assumpsit*, the right does not exist. In an action founded on tort, or *ex maleficio*, there can be no set-off; and in the present case, the bill is founded on an allegation of fraud in the deed. The appellant is not charged as a receiver of the property in question, and called upon to account: he is charged as claiming under the deed; and if the deed is vacated, every claim falls with it. Nor can he assert a right to compensation for disbursements, in relation to the subject, the whole transaction being tainted with fraud.

The objection of the want of proper parties comes now too late, and the case of *Hickok v. Scribner*, (3 Johns. Cas. 311.) cited by the opposite counsel, is inapplicable. It is a mere matter of form, and the objection should have been made in the Court below. (3 Bro. P. C. 122. *Rogers v. Cruger* 7 Johns. Rep. 557.)

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Hoffman, in reply, examined, at great length, the facts in the case. He urged, that the appellant was entitled to a preference, independent of any assignment. The appellant was lawfully in possession of the property, and had a right to retain for his own debt; yet, had he been an ordinary creditor, the preference given him cannot be impeached. *(5 *Johns. Rep.* 413.) The case of *Hendricks v. Robinson and others* (2 *Johns. Ch. Rep.* 283.) is strong and decisive to this point. Admitting that the deed of 1798 might have been avoided by creditors, yet this not having been done, the counsel contended, that it was in the power of the grantors to affirm it, and make subsequent appointments. (*Serry v. Arden*, 1 *Johns. Ch. Rep.* 261.) Conveyances can, at most, be deemed only voidable, unless the grantor himself can avoid them. But the deed of 1800 was valid; and he denied that there was any evidence of fraud, or of its being made in contemplation of bankruptcy; and as to the objection that it was void under the stat. 27 *Eliz.* (sess. 10. c. 44. 1 *N. R. L.* 75.) (a) he insisted that the act only applied to property within the reach of the creditor, by process out of the Courts of his own country; but whatever real property was assigned in this case was in the state of *Virginia*, and admitting that the statute extends to personalty, the personal funds were abroad. Should, however, the Court vacate the deeds, the appellant had a right of set-off under the bankrupt law, of which the Court would not deprive him. (*Cook's Bank. Law*, 265. 572. 577. *Mont. on Set-Off*, 51. 1 *Ves.* 375.) If they are valid, the bill must be dismissed; if invalid, the case must again be referred to a master, to ascertain and state the balance due from the appellant, after allowing him the deductions to which he is entitled.

THOMPSON, Ch. J. It has been correctly stated, that the material question in this case grows out of the deed of the 23d of *March*, 1798, taken in connection with the subsequent deeds between the same parties. But there have been some matters pressed into the argument which may be deemed, in some measure, collateral to the main question, and which it will be proper to notice, in order to prepare the mind for a just and correct view of those instruments. It has been broadly asserted, in argument, that the appellant was chargeable with *fraud in fact*. Upon what this assertion is bottomed, I have been unable to discover from an examination of the case. The charge is, to be sure, made in the bill; but it is met, and utterly repelled and denied, *by the answer; and there is not a particle of proof to make out the charge. We must, therefore, reject this allegation, as entirely destitute of foundation, arising from any extrinsic circumstances, which have been shown either to make out fraud in fact, or even to cast a suspicion upon the conduct of the appellant. If the transaction is to be stamped with the character of fraud, it must arise intrinsically from the deeds

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themselves. Whenever the fraud, if it exist at all, is to be collected only from the deeds themselves, it then becomes a question of fraud in law. No moral turpitude is attached to this species of fraud; or if at all, it is in a much less degree than where actual fraud, or fraud in fact, is imputable to the transaction.

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Again; the maxim, "*Equality is equity*," has been urged, with much apparent plausibility, against countenancing a sinking debtor, in giving preference to any of his creditors. Indeed, his honor the chancellor, in this case, whilst he admits the legality of such preference, doubts its policy, and enters into many considerations, showing the abuses to which this principle may lead. Was this question submitted to this Court as a question of policy, different views on the subject might be presented; but I do not feel myself at liberty to indulge in considerations of this kind, lest the apparent equity of the rule might have undue weight when misapplied to the case before us. If there is any principle of law settled, both here and in the *English Courts*, it is, that a debtor in failing circumstances may prefer one creditor, or one set of creditors, to another, except when controlled by the operation of a bankrupt system. Preferences are by that system forbidden; but as we had no such system at the time the deeds in question were given, we must decide this cause independent of the rules and policy peculiarly governing such cases. Although the legality of such preferences are too well established to require further consideration, it may not be amiss to notice some few of the adjudged cases on this question, to see how strongly the principle is fixed in our system of jurisprudence. No stronger cases need be referred to than those relied upon by the chancellor. In the case of *Small v. Oudley*, (2 P. Wms. 427.) the assignment was made to a *particular creditor, and but the day before the act of bankruptcy was committed, and was made even without the knowledge of the assignee. The master of the rolls said, there may be just reason for a sinking trader to give a preference to one creditor before another; to one that has been a faithful friend, and for a just debt lent him, in extremity, when the rest of his debts might be due from him as a dealer in trade, wherein his creditors may have been gainers. Cases, says he, may be so circumstanced, that the trader *honestly may, nay, ought to give the preference*. These observations apply with peculiar force to the case before us. A very considerable proportion of the appellant's claim consists of moneys and bills advanced, and responsibilities incurred, as endorser, surety, and bail; all which have always been considered, in Courts of justice, as having strong claims to priority and protection. So in the case of *Cock v. Goodfellow*, (10 Mod. 489.) the assignment was made to secure the fortunes of children; and the lord chancellor, in answering some of the objections made to the deed, observes, that the objection against it, "because made so

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near the act of bankruptcy, is a very frivolous one ; for the deeds meant by the statute, are deeds made to defraud creditors, whereas this was a deed made to secure a just debt. But," says he, " it is objected, that this deed is made to give an undue preference to children. I know not what law or reason there is to favor this objection. Any body may make his creditor executor, and then the law gives him a preference ; not only so, but the law allows the executor to give any other creditor, in equal degree, a preference." " A man who knows he must be a bankrupt, may, by law, pay off any of his creditors ; and this power, as it may be abused, so, on the other hand, may be very properly exercised. There may be particular objections in point of gratitude," &c. Here the broad and unqualified legal right to give a preference to creditors, is explicitly laid down, although, it is said, it may sometimes be abused.

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This, too, is the doctrine of a Court of chancery, and not deemed in hostility with the maxim, that equality is equity. The same principle is recognized and sanctioned in the Courts of common law. In the case of **Estwick v. Caillaud*, (5 Term Rep. 452.) Lord *Kenyon* says, " It is neither illegal nor immoral to prefer one set of creditors to another." And, again, in *Nunn v. Wilsmore*, (8 Term Rep. 528.) he says, " Putting the bankrupt laws out of the case, a debtor may assign all his effects for the benefit of particular creditors." So, also, in our Supreme Court, in *M'Menomy and Townsend v. Ferrers*, (3 Johns. Rep. 84.) Mr. Justice *Van Ness*, in giving the opinion of the Court, says, " Before the bankrupt law, debtors had a right to give a preference to *bona fide* creditors. There is nothing in our insolvent laws to prohibit it, and the bankrupt law left this right until the 1st of June, 1800 ;" but, admitting the deed was made with a view of giving a preference to certain creditors, and of which there was no doubt, " that," says he, " was permitted by the law of this state, and was not prohibited by the act of Congress, and, therefore, not fraudulent." This is a very strong case ; for the assignment was made after the passing of the late bankrupt law, (4th April, 1800,) and before the time of its going into operation. (1st June, 1800.) Again ; in *Willis and Fountain v. Ferris*, (5 Johns. Rep. 344.) the Supreme Court say, the debtor might lawfully prefer one set of creditors to another ; that it would be a waste of time to take notice of all the cases cited in support of this point ; that of *Estwick v. Caillaud* fully established it.

I think I may, then, assume it as a settled and unshaken principle, both at law and in equity, that a failing debtor has a just, legal and moral right to prefer, in payment, one creditor, or set of creditors, to another ; and not to extend the benefit of this rule, so well and so solemnly settled, to the case before us, appears to me to be admitting the principle in theory, but utterly denying to it all practical application.

With this view of the legal rights of the debtor and creditor,

and stripping the case of all imputation of actual fraud, which there is no color or ground to support, I proceed to notice the deeds under which the appellant claims to have acquired the preference he now sets up; and to examine whether legal fraud is to be inferred from any thing contained in the deeds themselves. The only circumstance relied upon in support of the allegation of fraud is, *that, in some of the deeds, the grantors, *Robert Murray and Co.*, have reserved a power to revoke and alter the trusts or appointments therein contained. This objection does not apply to the deed of the 31st of *May*, 1800; that is absolute and irrevocable. This, in connection with the first deed of the 23d of *March*, 1798, would, in my judgment, be amply sufficient to protect and establish the appellant's preference thereby gained. I do not see why the intermediate deeds of the 21th of *March*, 1798, and the 21st and 22d of *March*, 1799, may not be entirely laid out of view, as it respects the rights and claims set up by the respondents. Their title accrued after the 31st of *May*, 1800; and if, at that time, as between *Robert Murray and Co.*, and *John B. Murray*, all the title and interest of the former was transferred to the latter, there was nothing to pass under the bankrupt assignment to the respondents. If the controversy was between *John B. Murray* and some person deriving title from *Robert Murray and Co.*, prior to the 31st of *May*, 1800, and whilst the property was held under the revocable deeds, a very different question might be presented; but that is not the case here. The assignees of the bankrupt, *Robert Murray*, can take nothing but what the bankrupt himself could assign to them. (10 *Mt.* 497. 1 *Atk.* 191. *Salk.* 419.) All these intermediate deeds between that of the 23d of *March*, 1798, and the one of the 31st of *May*, 1800, if they are taken into consideration as forming a part of the transaction, were not, as between the parties to them, absolutely void, and incapable of confirmation. A deed founded in actual and positive fraud, as being made under the influence of corrupt motives, and with an intention to cheat creditors, may be considered void, *ab initio*, and never to have had any lawful existence. The grantee in the deed may be considered a *particeps criminis*, and is not permitted to deduce any right from an act founded in actual fraud. But this rule is not applied to contracts which are only considered fraudulent by construction of law, as being against the policy or provisions of some particular statutes. Such deeds are capable of confirmation. (4 *Johns. Rep.* 498.) "It has been a principle of long standing, and uniformly recognized," says the chancellor, *in the case of *Sterry v. Arden*, (1 *Johns. Ch. Rep.* 271.) "that a deed voluntary and fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto*. It is the constant language of the books and of the Courts, that a voluntary deed, which would have been void as against creditors, may be supported and made

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IN ERROR. good by a subsequent valuable consideration." (1 *Sid.* 133. 1 *East*, 95.) This doctrine, afterwards, on appeal, received the sanction of this Court. Admitting, therefore, that the deeds reserving the power of revocation, come within the policy of the statute of frauds, (for they do not within the letter, as the statute relates to conveyances of land,) they were voidable only, and subject to the control and confirmation of the parties, as long as the rights of third persons did not intervene and attach. The deed of the 31st of May, 1800, was such confirmation; and no intervening rights of creditors had attached. No judgments or execution, or any other legal lien, was set up. The statute (1 *N. R. L.* 77.) (a) only declares all grants of land, with power of revocation, void against subsequent purchasers for a valuable consideration. It is to such cases only, that the observations in *Tyler v. Littleton*, (2 *Brownl.* 190.) and in *Twine's case*, which have been cited and relied on, are to be applied. In *Lavender v. Blackstone*, (3 *Lev.* 146.) one of the principal grounds upon which the conveyance was set aside, was, because it had a proviso enabling the grantor to make leases for any term without rent; and this was considered as putting it in his power to defeat the whole settlement. But the deed of the 31st of May, 1800, in this case, contains no proviso whatever, by which the grantors could defeat its operation.

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It ought to be constantly kept in mind, that the conflicting claims of the parties here did not arise whilst the power of revocation existed. That power was completely extinguished by the deed of 1800, and before the respondents acquired any interest in the subjects embraced in those deeds. There can be no doubt, but that at that time (May, 1800) an original assignment might have been legally made, giving to *J. B. Murray* all the claim now set up. If so, there could be no good reason against his then taking a ratification, *or confirmation, of any prior defective assignment. In the case of *Tarbut v. Marbury*, (2 *Vern.* 510.) so much relied on for setting aside these assignments, it was a *judgment creditor* who was setting up his claim against the deed, which was set aside, because the power reserved to the grantor to mortgage and charge the estate with what sums he thought fit, was considered as amounting, in effect, to a power of revocation. Where the creditor is pursuing his debtor with a judgment and execution, or in any other manner, to enforce payment of his demand, an assignment of the debtor's property, containing a power of revocation, may very well be considered as made to "delay, hinder, or defraud creditors," according to the language of the statute of frauds. But I do not see how it could, in any sense, be said to delay or hinder a creditor, who was taking no measures to enforce payment of his demand, as is the case now before us. For any

(a) 2 *R. S.* 134.

thing that appears, all the creditors of *Robert Murray and Co.* were satisfied with the assignment, and the provision there made for the payment of their debts. This is an important feature, in which this case is distinguishable from the one of *Clark v. Hyslop*, decided in the Supreme Court, and on which so much reliance has been placed. *Clark* there was a judgment creditor, and had issued an execution against his debtor, which was levied on the property assigned to *Hyslop*. This levy was made at a time, too, when, by the very terms of the assignment, the property was not held under it, that is, after some of the creditors had refused to come in and accept of the terms proposed, and before any new trusts were declared, pursuant to the provisions in the assignment. It was with great propriety there said, that locking up the property in this manner was delaying and hindering creditors. The observations of Lord *Ellenborough*, in *Meux, qui tam, v. Howell*, (4 Term Rep. 14.) would seem to show that no creditor could be considered as delayed or hindered, within the sense and meaning of the statute of frauds, except such as were taking some measures to recover their debt. He says further, that the statute was meant to prevent the operation of deeds, &c. fraudulent in their concoction, and not merely such as, in their effect, might delay or hinder other creditors. (1 *Vesey, jun.* 160.)

*It is said by the chancellor, that it may be doubted whether the power of revocation contained in the prior deeds was not continued in the deed of the 31st of *May*, 1800. This did not, however, seem to be contended on the argument, and I am not able to discover any thing in this deed to justify such doubt. It appears to me to be an absolute and irrevocable appropriation of the property and debts described in the original assignment of the 23d of *March*, 1798. It recites and adopts that deed, and gives a final and absolute direction as to the payment of the debts therein specified; and at this time there was no impediment to the grantors so doing. They were the absolute and uncontrolled owners of the property. There was no judgment or other lien upon it. They could sell and dispose of it at pleasure, and might, most unquestionably, annex what trusts they thought proper. If, as I think I have shown, they had a just, legal and moral right to give preferences to certain creditors, there is no principle of law or equity that will justify taking away the preference thus given. The grantors having reserved to their own use, for their maintenance and support, a part of the property covered by this deed, forms no objection to the appropriation of the residue. This is fully established by the cases I have already referred to, and is, indeed, admitted by the chancellor in the case before us. Though in case of a deficiency to satisfy the creditors, they might apply to a Court of equity, for the appropriation of the property so reserved, towards the payment of their demands.

Briefly to recapitulate what I have said thus far on this case.

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If the deed of the 31st of *May*, 1800, may be taken in connection with that of the 23d of *March*, 1798, laying out of view, altogether, the intermediate deeds, as I think they may, in my judgment, there is no pretence whatever for setting them aside as fraudulent. They contain a clear, absolute, and irrevocable transfer and appropriation of the debts and property therein described; and this, too, at a time when the grantors were under no disabilities that disqualified them from making the assignment. But admitting that all the intermediate deeds, which contain the power of revocation, are to be taken in connection with the others, as forming one entire transaction, still there are no grounds on which the respondents can now claim to set them aside. The power reserved to the grantors to revoke and alter the trusts, forms the sole ground of exception. This, as between the parties, makes those deeds voidable only. If so, they are susceptible of modification and confirmation; and were modified and confirmed, and rendered irrevocable, by the deed of the 31st of *May*, 1800. If, as I have already mentioned, a controversy respecting this property had arisen between *John B. Murray* and some of the creditors of *Robert Murray and Co.*, previous to *May*, 1800, and whilst these prior deeds were revocable, a very different question might arise. The transaction might very well, in that case, be considered as an expedient to lock up the property, and keep it out of the reach of the prosecuting creditor. But the respondents come here as the assignees of *Robert Murray*, and under a title derived from him, after his assignment to *John B. Murray* was confirmed and made irrevocable. In my opinion, therefore, the decree which declares these deeds null and void, ought to be reversed.

Admitting, however, the decree, in this respect, to be correct, it cannot be affirmed throughout. The cause must, at all events, be sent back to a master to take a new account. The order of reference, and the report of the master, are all founded on the assumption that the assignment was valid. The master is directed to take an account of the moneys received, and of the moneys paid or retained by *John B. Murray*, and which ought to be allowed him in pursuance of the trust; and he has made no discrimination between the moneys received under this assignment, or otherwise. If the assignment is declared void, it cannot affect any rights which the appellant may have acquired under any previous assignments, or transactions, between him and *Robert Murray and Co.* That he had acquired such rights, sufficiently appears, from the case before us, to justify sending the cause back to a master for a new account of moneys received and paid under such prior assignment, or dealings, between the parties.

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*Nor does it appear to me, that the decree ordering the appellant to pay the 81,836 dollars can be sustained, even within the principles laid down by the chancellor. He does not

profess to make the appellant account for any more than he received under the assignment. On this part of the case, he says, the question is, whether I ought not to go further, and make *J. B. Murray* account for the property he has received under the assignment, and place that also in the hands of the assignees of *Robert Murray*, for general and equal distribution; and concludes that he cannot perceive any other alternative, but either to give complete effect to the assignment, as a fair and valid instrument, or to make *J. B. Murray* account for the property received under it. And the latter, he says, is the proper conclusion. Admitting this to be the correct principle, the decree makes him account for property he never did receive under that assignment, but in pursuance of arrangements antecedent to it; and this, too, without the least imputation of fraud or unfair conduct. The claim on the *British* government, and the negotiation with *Bird, Savage and Bird*, fall within this class. I do not perceive why, even laying aside the assignment, *J. B. Murray* is not entitled to retain a considerable portion of his demand, by way of set-off, under the bankrupt law. That act declares, that where there has been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before the person became bankrupt, the one debt may be set off against the other, and the balance only claimed. This provision has, under the bankrupt system in *England*, received a liberal construction, where such debts or credits have accrued, without any intention to defraud the rest of the creditors of the bankrupt. No such intention has been imputed to the appellant, prior to the first assignment of the 23d of *March*, 1798. (1 *Atk.* 228. 4 *Term Rep.* 211. 1 *Term Rep.* 285.) Lord *Hardwick*, in the case *ex parte deezee*, (1 *Atk.* 228.) says, "Notwithstanding the rules of law, as to bankrupts, reduce all creditors to an equality, yet it is hard, when a man has a debt due from a bankrupt, and has, at the same time, goods of the bankrupt in his hands, which cannot be got from him without the assistance of law or equity, that the assignee should take them from him, without satisfying the whole debt; and, therefore, the clause in the statute relating to mutual credit has received a very liberal construction; and there have been many cases which that clause has been extended to, where an action of account would not lie; nor could the Court of Chancery upon a bill decree an account." That mutual credit was not confined to pecuniary demands, but extended to all cases where the creditor had goods in his hands of the debtor, and which could not be got at without an action at law, or a bill in equity. Numerous cases might be cited, both at law and in equity, which sanction and enforce this principle. But I think it unnecessary further to pursue this part of the case, as I place my opinion principally upon the validity of the assignments, especially the one of the 31st of *May*, 1800, in connection with that of the 23d of *March*, 1798.

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IN ERROR. I am, accordingly, of opinion, that the decree of the Court of Chancery ought to be reversed.

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SPENCER, J., was absent on account of sickness.

YATES, J. concurred in the opinion of the chief justice.

VAN NESS, J., and PLATT, J., and eight of the senators, were of opinion, that the decree ought to be reversed in part only; but a majority of the Court concurring in the opinion delivered by the chief justice, it was ORDERED, ADJUDGED, and DECREED, that the decree of the Court of Chancery be wholly reversed, on the ground, that the assignment of the 31st of *May*, 1800, was legal and valid.

Decree of reversal.

END OF THE CASES OF ERROR.

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TO

THE PRINCIPAL MATTERS

IN THE FIFTEENTH VOLUME.

A.

ABSENT AND ABSCONDING DEBTORS.

1. Under an attachment issued in pursuance of the act against *absconding and absent debtors*, the sheriff may take and sell property of which the absconding debtor is a tenant in common with another, though it be in the possession of his co-tenant. *Mersereau v. Norton*, 179
2. But the sheriff can sell only the undivided moiety or interest of the debtor, and the purchaser at such sale becomes a tenant in common with the other co-tenant, who cannot, therefore, maintain trespass or trover against him, the tenancy in common not being severed or destroyed by the sale. *ib.*

Vide COURT OF JUSTICES OF THE PEACE, VIII. 17.

ACKNOWLEDGMENT.

- See *led by feme covert, vide* COLONIAL LAWS, 3. DEED, I. 1, 2, 3.

ACTION.

1. Where the plaintiff has an entire demand, he cannot divide it into distinct parts, and bring separate ac-

tions for each; as, on an entire contract of sale of goods, he cannot maintain an action for one part of the goods sold, and another action for another part. *Smith v. Jones*, 229

2. So, where there has been a trespass or conversion by any single indivisible act, in relation to several chattels, the plaintiff cannot split his claim for damages, by bringing separate actions of trespass, or trover, for each particular article seized or converted; and a recovery for one part or parcel is a bar to an action for another part or parcel. *Farrington and Smith v. Payne*, 132
3. An action on the case against a sheriff for a false return, is within the provisions of the act for the more easy pleading in certain suits, (*March* 21st, 1801, sess. 24. c. 47. s. 4. 1 *N. R. L.* 155.) and the plaintiff is bound to show that the cause of action arose within the county where he has laid his venue. *Seeley v. Birdsall*, 267
4. There is a distinction between acts done *colore officii* and *virtute officii*: in the former case, the act being of such a nature, that his office gives him no authority to do it, the sheriff is not protected by the statute; but where, in doing an act within the limits of his authority, he exercises his authority improperly, or abuses the confidence which the law re-

poses in him, these are cases to which the statute applies. *Secley v. Birdsall*, 267

- b. The suing out the writ is the commencement of the suit, and not the exhibition of the bill. Per *Spencer, J. Fowler v. Sharp and another*, 326

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Vide ACTION, 3.

ACTION ON THE CASE.

1. No action lies for representing the plaintiff's ferry not to be as good as another rival ferry, and inducing and persuading travellers to cross at the other, and not at the plaintiff's ferry. *Johnson v. Hitchcock*, 185
2. A mortgagee cannot maintain an action for waste against the mortgagor, at least until after a forfeiture of the mortgage. *Peterson v. Clark*, 205
3. A person having an expectant interest in land, less than the inheritance, cannot maintain an action for waste. *ib.*
4. A person, erecting a mill and dam upon a stream of water, does not, by the mere prior occupation, unaccompanied with such a length of time as that a grant may be presumed, gain an exclusive right, and cannot maintain an action against a person erecting a mill and dam above his, by which the water is in part diverted, and he is in some degree injured. *Platt v. Johnson and Root*, 213
5. Where a damage is suffered by the act or omission of a public officer, contrary to his duty, the party injured may maintain an action on

the case against the officer. *Bartlett v. Crozier*, 250

6. Where an overseer of highways wilfully neglects to repair a bridge within his district, by reason of which the plaintiff's horse falls through and breaks his leg, an action on the case may be maintained. *ib.*
7. It seems, that the declaration, in such action, should allege, that the commissioners of the town had provided materials, and that the defendant had the means of making the repairs; but the omission is cured, after verdict, by the common law intendment, that the defect was supplied on the trial, by proof. *ib.*
8. An action on the case will lie against a sheriff for not returning an execution, or the party may proceed by attachment. *Burk v. Campbell*, 456

ACTION ON STATUTE.

In an action under the 2d section of the act to prevent gaming, (sess. 24. c. 46. 1 N. R. L. 153.) by the losing party, against the winner, to recover back money lost at play, and paid, the plaintiff may declare generally in debt, for money had and received, without stating his case specially, or referring to the statute; but it is otherwise in the case of an action brought by a common informer. *Collins v. Ragrew*, 5

ADMIRALTY.

Vide PRIZE.

ADVERSE POSSESSION.

Vide DEVISE, 3. EJECTMENT, 1

AFFIDAVIT.

Vide PRACTICE, 1.

AGENT.

1. An agent who makes a contract in behalf of his principal, whose name he discloses, at the time, to the person with whom he contracts, is not personally liable. *Rathbon v. Budlong*, 1
2. There is no difference in this respect between an agent for government and an individual. *ib.*
3. The principal is liable for the acts of a general agent, acting within the general scope of his authority; and a third person cannot be affected by any private instructions from the principal to his agent. *Munn v. The Commission Company*, 44
4. But the principal is not bound by the acts of a special agent beyond his authority. *ib.*
5. A company incorporated for the purpose of selling goods on commission, is bound by the acceptance of its general agent of a bill drawn on the company, on account of goods stipulated to be deposited with the company, for sale on commission. *ib.*
6. If a man deals with another's agent, and gives the agent a receipt for a sum of money, which the agent had a right to pay, and on the faith of that receipt the principal settles with the agent and pays him money, the party giving the receipt is concluded from looking to the principal; for he should have given him notice of the mistake in the first instance; and his only remedy is against the agent. *Chever v. Smith, Pardee and others*, 276

AGREEMENT.

- 1 The ransom of a vessel and cargo captured by an enemy is a lawful contract, and an action may be maintained in our Courts to recover the money agreed to be paid to the captor on such ransom. *Goodrick and De Forest v. Gordon*, 6
2. Nor is it unlawful, after the capture, VOL. XV. 59

to receive a passport from the captor, to protect the vessel from another capture. *ib.*

3. In an agreement for the sale and conveyance of land, the vendor covenanted to convey the land, which was to be surveyed, free of encumbrances, by the first of *January*. The land was not surveyed in time, and the vendee declared that he would take no advantage on account of the vendor's not conveying on the precise day mentioned in the agreement. It was held, that the vendee, by enlarging the time, did not waive his right to recover a sum which was fixed and liquidated by the agreement, as the amount of damages to be recovered by the party failing in performance, even admitting that his consent to extend the time amounted to an agreement; for such subsequent agreement by parol, was void by the statute of frauds, and could not alter, revoke, or modify the previous valid contract. *Hasbrouck v. Tappan*, 200
4. A mere extension of the time of performance of an agreement, is not a waiver of any of its stipulations. *S. C. Per Thompson, Ch. J.* 204
5. In an action to recover the amount of a promissory note, delivered by the plaintiff to the defendant, in pursuance of an agreement between them, of which note the defendant had received payment, the plaintiff may show that he was, at the time of making the agreement and delivering the note, insane, and incapable of contracting. *Rice v. Peet*, 503

Agreement avoided by fraudulent misrepresentations, *vide ASSUMPSIT FOR GOODS SOLD*.

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AMENDMENT.

1. Where one count in a declaration is good, and the others bad, if the judge will certify that the evidence applied solely to that count, or that all the evidence given would properly apply to that count, as well as the others, the verdict may be amended by applying it to the good count; and if the evidence did not particularly apply to the bad count, the verdict may also be amended. *Cooper v. Bissel*, 318
2. Where a Court of C. P. refused leave to amend a general verdict, by applying the evidence to one count, and to enter a *non pros.* as to the other, this Court, on a writ of error, judgment having been entered on the verdict below, cannot grant leave to amend the record. *ib.*
3. It seems, that a Court of errors cannot grant an amendment by inquiry into facts *dehors* the record. *ib.*

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Vide JUDGMENT, 2.

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Vide FRAUDULENT SALES AND CONVEYANCES, 1.

ASSIGNMENT.

Where an assignee recovers a judgment in the name of his assignor, and takes out a *ca. sa.*, giving the sheriff notice of his equitable interest, and the sheriff, having arrested the defendant, suffers him to escape, the assignee may maintain an action

against the sheriff, for the escape, in the name of the assignor, which the sheriff cannot defeat by taking a release from the nominal plaintiff. *Martin v. Hawks*, 405

Assignment by debtor in trust to pay debts, *vide* FRAUDULENT SALES AND CONVEYANCES, 4, 5, 6, 7, 8.

ASSUMPSIT.

1. Where a party in a suit becomes entitled to costs from the opposite party, for opposing a motion, who (the costs having been taxed) promises to pay the bill, the promise is founded on sufficient consideration, and will support an action. *Warner v. Boog*, 233
2. Where an ejectment cause was referred by consent of the parties, and the land in question surveyed, it was held, that the party succeeding in the cause, who had paid expenses attending the survey, was entitled to recover half of these expenses from the opposite party, there being some evidence of an agreement that they should be borne equally, and such expenses not being admissible in the taxation of the costs of the suit. *Low v. Vroonnan*, 238
3. Where a person has, at the request of an overseer of the poor, and on his promise that he would see him paid, boarded a pauper, and furnished him with necessaries, he may maintain an action of *assumpsit* against the overseer, although no order had ever been made for the relief of the pauper. *King v. Butler*, 281
4. A declaration in *assumpsit* stated a promise from the plaintiffs to the defendant not to require the payment of a certain note, endorsed by the defendant to the plaintiffs, in consideration whereof the defendant promised the plaintiffs to indemnify them from one third of all loss which they might sustain in

consequence of their endorsement of certain notes for a third person; that the plaintiffs had never required payment of the note, and that they had sustained a loss to a certain amount: Held, that the declaration was bad, in not stating that the third person was insolvent, otherwise there was no consideration for the defendant's promise, either of benefit to himself, or of loss to the plaintiffs; besides, the insolvency of the maker of the notes must be averred, because the promise of the defendant must be construed to mean, that he would pay one third part of the loss, provided it could not be recovered of the maker of the notes, and not merely that the defendant should be liable, in the first instance, for one third of the loss. *Morse and Bulling v. Morse*, 425

Assumpsit for non-delivery of goods,
vide ASSUMPSIT FOR GOODS SOLD.

ASSUMPSIT FOR GOODS SOLD.

Where the defendant sold the plaintiffs a note of the president and directors of a certain company, and also two shares of the stock of the company, for which he was to be paid in whisky, fraudulently representing the company to be good and responsible, when, in fact, he knew them to be insolvent, and the plaintiffs executed their notes, or agreements, to deliver the whisky at a future period, which they delivered accordingly, and having afterwards discovered the insolvency of the company, tendered the defendant the note and stock which they had received from him; it was held, that the special contract was vitiated by the fraud of the defendant, by which the presumption that the note and stock were taken as payment, was repelled; that, had the plaintiffs been sued by the defendants for the non-delivery of

the whisky, his fraud would have been a defence to the action, and that the plaintiffs, having delivered the whisky, might recover the price of it, under a count for goods sold and delivered. *Pierce and Pierce v. Drake*, 475

ASSUMPSIT FOR MONEY HAD AND RECEIVED.

1. Where tenants in common sell and convey land, and one only receives the purchase money, the other may maintain an action of *assumpsit* against him for money had and received, to recover his proportion of the price. *Coles v. Coles*, 159
2. Where, on a parol agreement for the exchange of lands, which is void by the statute of frauds, the plaintiff delivered to the defendant the promissory note of a third person, as a pledge, to be forfeited in case of the plaintiff's non-compliance with the agreement, and the defendant received payment of the note, the plaintiff may recover the amount of the note from the defendant, the delivery of the note being without consideration. *Rice v. Peet*, 503

ASSUMPSIT FOR MONEY LENT AND MONEY PAID.

Vide PARTNERSHIP, 7.

ATTACHMENT.

Against sheriff, *vide* ACTION ON THE CASE, 8.

ATTORNEY.

1. Where process is issued out of a justice's Court, against an attorney or counsellor, and served during the term of the Court of which he is an attorney or counsellor, the defend-

- ant may plead his privilege in abatement, although the process was returnable after the end of the term. *Gilbert v. Vanderpool and Beekman*, 242
2. A plaintiff obtained a judgment against a defendant for six cents damages, with costs. The plaintiff's attorney gave notice to the defendant to pay the amount of the judgment to him, and not to the plaintiff, and issued a *ca. sa.*, and directed the sheriff to pay over the money, when collected, to him, and not to the plaintiff, the attorney being entitled to the whole amount of the judgment, except six cents, as his costs. The defendant was arrested, and the sheriff voluntarily suffered him to escape. The attorney brought an action for the escape against the sheriff, in the name of the original plaintiff. Held, that the sheriff could not avail himself of a release from the original plaintiff, in bar of the action, such release being a fraud upon the attorney, as it was executed with notice to all the parties of his lien for his costs. *Martin v. Hawks*, 405
 3. The attorney has a lien on a judgment recovered by his client, for his costs; and if the defendant, after notice from the attorney, pay the amount of the judgment to the plaintiff, without satisfying the attorney for his costs, such payment is in his own wrong, and he is liable to the attorney for the amount of his bill. *ib.*
 4. An attorney of this Court is not good bail. *Coster v. Watson*, 535
- to arbitration, and a sum of money, and possession of the farm, were awarded to the defendant, who brought an action of ejectment to recover the possession, and it was then agreed that the plaintiff should give up possession to the defendant, and that the defendant should relinquish his claim under the award, and pay the plaintiff 150 dollars, it was held, in an action on a note given to secure part of that sum, that the note was given on a good consideration, and was valid, the subsequent settlement not being affected by the previous award, and the parties having authority to vary the rights acquired under it. *Hall v. Brown*, 194
2. Under a general submission of all controversies and demands, the arbitrators may award as to real property; and where an award settles the boundary of land, it is sufficient to enable the party to whom the land has been awarded to bring an action of ejectment, and is a justification in an action of trespass brought by the other party. *Sellick and Sellick v. Adams*, 197
 3. Where sworn copies of the award are delivered to the parties by the arbitrators, and received without objection, this will be deemed a waiver of their right to receive the original award. *ib.*
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Vide AGENT, 3, 4, 5.

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1. Where the possession of a farm, and some other matters in controversy between the parties, were submitted

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B.

BAIL.

1. The rule on the sheriff to bring in the body of the defendant, cannot be served until 20 days after the

- time in which the writ is returned have expired; and it seems, that the rule ought not to be entered before the expiration of that time. *Coons v. M'Manus*, 181
2. An attorney of this Court is not good bail. *Coster v. Watson*, 535

BANKRUPT.

Where there are mutual dealings between *A.* and *B.*, and *A.* having the property of *B.* in his hands, *B.* becomes a bankrupt, *A.* is entitled to set off his debts or demands against the funds in his possession, and can only be compelled to account to the assignees of *B.* for the balance, even though the subject of the set-off would not be admissible at law. *Murray v. Riggs and others*, 571

BANKS.

Vide CORPORATION, 4.

BARON AND FEME.

Where a husband and wife execute a conveyance, in which they both covenant to the grantee, the wife cannot be joined with her husband in an action for a breach of the covenant, her acknowledgment having no further effect than to convey her interest in the land, and not binding her by the covenants contained in the deed. *Whitbeck v. Cook and Wife*, 483

Further, as to conveyance by wife, *vide* COLONIAL LAWS, 2, 3.

Illegal marriage, *vide* DIVORCE.

Actions by and against husband and wife *vide* TRADING, I. 1, 4, 5.

BASTARD.

The mother of a bastard child, three or four years old, is entitled to its custody; and the putative father and his surety, on a bond given for the maintenance of the child, cannot exonerate themselves from liability by demanding the child. *Carpenter and Rose v. Whitman and another*, 208

BILL OF EXCEPTIONS.

The rule of practice as to Cases does not apply to bills of exceptions; and an order to stay proceedings is unnecessary, or it may be granted of course. *Hasbrouck v. Tappen*, 182

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Form, validity, acceptance, and endorsement.*
- II. *Liability of parties, and when discharged.*
- III. *Action and damages.*

I. *Form, validity, acceptance, and endorsement.*

1. Where a person by writing authorizes another to draw a bill of exchange, and stipulates to honor the bill, and a bill is afterwards drawn, and taken by a third party, on the faith of the written engagement, this is tantamount to an acceptance of the bill. *Goodrich and De Forest v. Gordon*, 6

2. Where a bill or note is valid, as between the drawer, or maker, and the payee, so that the latter can maintain an action upon it against the former, it is valid in the hands of an endorsee, who has discounted it at a higher rate than the legal rate of interest, and he may recover the full amount of the bill or note, 469

- against the maker or acceptor.
*Munn v. The Commission Com-
 pany*, 44
3. But the holder of a note, purchased at a discount greater than the legal rate, can only recover from his endorser the sum which he actually advanced. *ib.*
 4. A bill or note drawn for the purpose of being discounted at a usurious rate of interest, and endorsed for the accommodation of the maker or drawer, is void in its original formation. *ib.*
 8. *P Bennet v. Smith and Phelps*, 355
 5. The word *month*, when used in bills of exchange and promissory notes, is construed to mean a lunar month. *Loring v. Halling*, 120
 6. Where the possession of a farm, and some other matters in controversy between the parties, were submitted to arbitration, and a sum of money, and possession of the farm, were awarded to the defendant, who brought an action of ejectment to recover the possession; and it was then agreed that the plaintiff should give up possession to the defendant, and that the defendant should relinquish his claim under the award, and pay the plaintiff 150 dollars; it was held, in an action on a note given to secure part of that sum, that the note was given on a good consideration, and was valid, the subsequent settlement not being affected by the previous award, and the parties having authority to vary the rights acquired under it. *Hall v. Brown*, 194
 7. A promissory note given on the sale of a chattel, fraudulently represented by the seller to be of great value, when, in fact, it was of no value, is without consideration, and void. *Sill v. Rood*, 230
 8. There is an implied warranty in the transfer of every negotiable instrument, that it is not forged. *Herrick v. Whitney and others*, 240
 9. The endorsement of a promissory note to *A. B., or order, for value received*, transfers the legal title in the note to the endorsee, which cannot be divested, except by cancelling the endorsement, or endorsing it again. *Burdick v. Green*, 247
 10. Where a bill of exchange was drawn here upon a person in *Great Britain*, during the late war with that country, for supplies furnished by the payee to a *British* vessel authorized by act of Congress to sail from here to an enemy's port, which was sold by the payee to the plaintiff, who remitted it to *Great Britain* for collection, it was held, that the remittance of the bill was within the protection afforded to the original transaction, and was not illegal. *Suckley v. Furse*, 338
- II. *Liability of parties, and when discharged.*
- A bill of exchange was drawn by the defendant on *A.* in favor of *B.*, who sold it to the plaintiff. *A.*, who resided in *England*, accepted the bill, but did not pay it, and it was returned to the plaintiff protested. The plaintiff then drew a bill upon *A.* and the defendant jointly, for the amount of the former bill, with damages, which was accepted by *A.* only, but was not paid. Held, in an action against the defendant, as drawer of the first bill, that he was not discharged by *A.*'s acceptance of the second bill. *Suckley v. Furse*, 338
- III. *Action and Damages.*
12. Where a person engages to labor for another for a year, at a certain price for the whole time, and on leaving his service before the expiration of the year, it not appearing that he went away without his consent, the hirer gives him a draft, in consideration of his past services, which was not paid, or accepted by

the drawee, in an action on the draft by the payee against the drawer, the latter cannot defeat the recovery, by introducing the original contract of service. *Hoar v. Clute*, 224

13. A note was endorsed by the defendant for the accommodation of the makers, who were then in good credit. Before negotiating the note, they became insolvent, and the defendant then directed them not to part with the note, which they promised. They afterwards passed it to the plaintiffs, with full notice of all the circumstances, in satisfaction of a debt due from them to the plaintiffs, which covered part of the amount of the note, receiving from the plaintiffs the balance in cash. The plaintiffs brought an action on the note against the endorser. Held, that the plaintiffs were not *bona fide* holders of the note, and could not, under the circumstances, support the action; and that, as the defence rested on matters arising subsequent to the execution of the note, one of the makers of it was a competent witness to defeat the recovery, and that without a release; he being indifferent between the parties. *Skelding and Haight v. Warren*, 270

Vide EVIDENCE, IV. 16, 17.

BILL OF PARTICULARS.

Vide PRACTICE, II. 2.

BOND.

1. One obligor cannot plead that the bond was obtained of his co-obligor by duress. *Thompson v. Lockwood*, 256
2. But this rule does not apply to a bond taken by a sheriff from a defendant, whom he has no right to

detain in custody; and the co-obligor, or surety, may avail himself of the defence of duress, in a several action against him. *ib.*

BOUNDARIES.

Vide DEED, I. 4, 5, 8, 9.

BRITISH LICENSE.

Vide INSURANCE, I. 1.

C.

CERTIORARI.

1. On an appeal from the decision of commissioners of highways to three of the judges of the Court of Common Pleas, under the 36th section of the *act to regulate highways*, (sess. 36. c. 33. 2 *N. R. L.* 232.) if the decision of the commissioners is reversed, a *certiorari* will lie, on the behalf of the commissioners, to remove the proceedings into this Court; the right to bring a *certiorari* being reciprocal, and belonging as well to the commissioners as to the appellants. *Commissioners, &c., of Kinderhook v. Claw and another*, 537
2. Wherever magistrates proceed judicially, both the parties to the proceedings are entitled to be heard, and notice to both is indispensably requisite, notwithstanding that there is no direction in the act by which the tribunal is constituted, that notice shall be given. *ib.*
3. And if notice were not given, the proceedings of the magistrates will be reversed on *certiorari* *ib.*

CERTIORARI TO A JUSTICE'S COURT.

1. On a *certiorari* to a justice's Court, the plaintiff in error may assign as

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error in fact such matters as could not come under the observation of the justice, and, therefore, could not be returned by him; as the misconduct of the jury after they had retired to make up their verdict. *Harvey v. Ricket*, 87

2. In reviewing the proceedings of justices' Courts, this Court is not regulated by the rules applicable to writs of error. *ib.*

3. In matters of tort, the Court does not interfere to reverse judgments on the ground of excessive damages. *ib.*

4. When, on a *certiorari* to a justice's Court, the judgment is affirmed in part, and reversed in part, costs in error will not be allowed on either side. *Williams v. Sherman*, 195

5. If the parties in a justice's Court agree to try the cause on its merits, this does not preclude the defendant, who was sued for a debt contracted by his wife before marriage, from objecting on *certiorari* to the non-joinder of his wife, although he did not insist on the non-joinder in the Court below; but he did not waive the objection; and the agreement applies only to formal and technical objections. *Gage v. Reed and another*, 403

6. The misrecital by a justice of the peace, in the return to a *certiorari*, of the title of the act for the recovery of debts to the value of twenty-five dollars, will be disregarded. *Farrington and Smith v. Payne*, 431

CHANCERY.

A party cannot obtain relief in equity against a mortgage given for a usurious debt, without offering to redeem on payment of the principal and legal interest. *Dunham v. Dey*, 555

CHARTER-PARTY.

Vide FREIGHT AND CHARTER-PARTY. 472

COLONIAL LAWS.

1. The charter of 1683, of James, Duke of York, was not in force after the revolution in 1688. *Jackson, ex dem. Woodruff, and others, v. Gilchrist*, 89

2. Whether, before the colonial act of 1771, the interest of a *feme covert* in land could, in this state, be conveyed otherwise than by fine? *Quære. ib.*

3. The statute of 1771, "to confirm certain ancient conveyances," provided, that no claim to any real estate whereof any person was then actually possessed, should be deemed to be void upon the pretence that the *feme covert* granting the same had not been privately examined; it seems, that in respect of new and unsettled lands, the constructive possession arising from the right of property, is sufficient to satisfy the words of the act, such possession being sufficient in other cases; as, to entitle the husband to an estate by the courtesy, or to enable the owner to maintain trespass. *ib.*

COMMON CARRIER.

1. Where goods were put on board the defendant's vessel to be carried to *Albany*, and, on arriving there, were, by the defendant's direction, put on the wharf, it was held that this was not a delivery to the consignee, and that evidence of a usage to deliver goods in this manner was immaterial, but that the defendant was liable in an action of trover for such part of the goods as was not actually delivered to the consignee. *Ostrander v. Brown and Stafford*, 39

2. And although the goods were taken away without the direction of the consignee, by a cartman usually, or always, employed to transport his goods, and the greater part

actually received by the consignee, this was held not to be evidence of the delivery of the part alleged to be lost, as he was not to be deemed the general agent of the consignee for receiving his goods. *ib.*

3. A carrier is not justified by the inability, or refusal, of the consignee to receive the goods, in leaving them exposed on a wharf, but it is his duty to secure them for the owner. *ib.*

COMMON INFORMER.

Vide GAMING.

CONSIGNOR AND CONSIGNEE.

Vide COMMON CARRIER. FREIGHT AND CHARTER-PARTY, 2.

CORPORATION.

1. A corporation, authorized by the act of incorporation to employ their stock solely in advancing money upon goods, and the sale of such goods upon commission, may lawfully accept bills drawn on account of future consignments, or deposits of goods. *Munn v. The Commission Company*, 44
2. A company incorporated for the purpose of selling goods on commission, is bound by the acceptance of its general agent of a bill drawn on the company, on account of goods stipulated to be deposited with the company for sale on commission. *ib.*
3. A corporation has no other powers than such as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted. *The People v. The Utica Insurance Co.*, 358
4. An information in the nature of a *quo warranto*, lies against an incor-

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porated company, for carrying on banking operations without authority from the legislature. *ib.*

5. A statute restraining any *person* from doing certain acts, applies equally to corporations or bodies politic, although not mentioned. *ib.*
6. Corporations are liable to be taxed, or rated, as persons or inhabitants, within the meaning of a statute. *S. C. Per Thompson, Ch. J.*, 382

COSTS.

Costs in general.

1. Where a party in a suit becomes entitled to costs from the opposite party for opposing a motion, who (the costs having been taxed) promises to pay the bill, the promise is founded on sufficient consideration, and will support an action. *Warner v. Bouge*, 233
2. Where costs have been, upon taxation, improperly struck out of the bill, the remedy of the party is by appeal from the taxation, and not by action against the opposite party for the charges which were rejected. *Loe v. Vrooman*, 238
3. In an action by a witness to recover his fees from the party who *suborned* him, he may give parol evidence that he attended before the Court, and was examined. *Baker v. Brill*, 260

Attorney's lien for his costs, *vide* ATTORNEY, 2, 3.

Costs in error, *vide* CERTIORARI TO A JUSTICE'S COURT, 3. ERROR, 6.

Vide DOWER, 8.

COVENANT.

1. In assigning a breach of a covenant for quiet enjoyment, contained in a conveyance of land, the plaintiff

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must show an entry and expulsion from, or some actual disturbance in, the possession. *Whitbeck v. Cook and Wife*, 483

2. It is not a breach of the covenants that the grantor was lawful owner of the land, was well seised, and had full power to convey, that part of the land was a public highway, and was used as such; a public highway being a mere easement, and the seisin and right to convey still continuing in the owner of the land over which it is laid out. *ib.*
3. Where a husband and wife execute a conveyance, in which they both covenant to the grantee, the wife cannot be joined with her husband in an action for a breach of the covenant, her acknowledgment having no further effect than to convey her interest in the land, and not binding her by the covenants contained in the deed. *ib.*
4. In an action for the breach of a covenant contained in an agreement, the plaintiff cannot recover back from the defendant money which he paid him to induce him to enter into the agreement, as it is still subsisting and unrescinded, especially when the plaintiff, in the same action, recovers damages for a breach of the covenant. *Shepherd v. Ryers*, 497
5. The plaintiff and defendant, being joint proprietors of a tract of land, of which the plaintiff had conveyed a part by deed, with covenant for quiet enjoyment and warranty, agreed to make partition of the tract in such manner that the part conveyed by the plaintiff should be set off in his portion, and they appointed three persons to make the partition, and covenanted to execute releases to each other. The persons appointed having made partition the defendant refused to execute a release: Held, that the plaintiff was not entitled to recover, as damages for the breach of the agreement to release any part of the consideration expressed in the

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deed to his grantee, who had never been evicted, the plaintiff's liability being merely contingent; and he can have no claim against the defendant for damages to which he may, by possibility, be liable to his grantee; besides, it is questionable, whether the defendant would not be estopped by the partition, which, though it has not the operation of a conveyance, might be considered in the nature of an award, from setting up a title against the plaintiff's grantee. *ib.*

COUNSELLOR.

Vide ATTORNEY, 1.

COURT OF COMMON PLEAS.

Vide ERROR, 3.

COURTS OF JUSTICES OF THE PEACE.

- I. *Process, appearance, and default.*
- II. *Declaration, pleadings, issue, and set-off.*
- III. *Adjournment.*
- IV. *Jury, trial, evidence, and verdict.*
- V. *Discontinuance and other irregularities, and when waived.*
- VI. *Judgment and costs.*
- VII. *Execution.*
- VIII. *Attachment against absent and absconding debtors.*

I. *Process, appearance, and default.*

1. A defendant in a justice's Court, who has been served with a summons, may plead and make his defence, if he appear before the justice has entered upon the trial of the merits of the cause; and the justice has no authority to enter his default for not appearing, on

being called before the trial. *Sweet and another v. Coon*, 86

2. Where a party appears by attorney in a justice's Court, the attorney is a competent witness to prove the execution of the power to himself. *Caniff v. Myers*, 246

II Declaration, pleadings, issue, and set-off.

3. A plea in abatement in a justice's Court needs not be verified by affidavit. *Gilbert v. Vanderpool and Beekman*, 242
4. In an action of trespass on land in a justice's Court, the defendant cannot, after pleading the general issue, interpose a plea of title; nor can he under the general issue give evidence of title. *Quimby v. Hart*, 304

Plea of privilege by attorney, vide ATTORNEY, 1.

III. Adjournment.

- 5 Where a cause has been once adjourned in a justice's Court by consent, and the defendant then applies for a second adjournment, on account of the want of a material witness, but does not show that due diligence had been used to obtain the witness, and refuses to disclose who or where the witness was, it is proper for the justice to refuse the adjournment. *Farrington and Smith v. Payne*, 432
6. Where a defendant is sued in a justice's Court by warrant, he is entitled to an adjournment on giving good security for his appearance, without making oath of the want of a material witness. *Cross v. Moulton*, 469
7. Where a cause in a justice's Court has been once adjourned by consent of parties, a second adjournment cannot be granted at the

instance of the plaintiff. *Payne v. Wheeler*, 492

IV. Jury, trial, evidence, and verdict.

8. Where a jury has been impanelled before *Sunday* commences, their verdict may be received on *Sunday*; but in a trial in a justice's Court, the justice cannot enter judgment on the verdict on that day. *Hoghtaling v. Osborn*, 119
9. A justice of the peace has no right, during a trial before him, to permit the parties to treat the jury with spirituous liquor. *Kellogg and Reed v. Wilder*, 445
10. A justice has no right on his own mere motion, without any exception being taken by either party, to charge the panel of jurors, and issue a new *venire*. *Cross v. Moulton*, 469

Vide CERTIORARI TO A JUSTICE'S COURT, 1.

V. Discontinuance, and other irregularities, and when waived.

11. Where, in a justice's Court, the cause has been adjourned to a future day, at a certain hour, when the defendant appears, but the justice does not arrive until an hour afterwards, and in about twenty minutes is followed by the plaintiff, and the defendant, on seeing the plaintiff, goes away, declaring that the cause is out of Court, although apprized by the justice that he should call it immediately, the delay does not, under the circumstances of the case, amount to a discontinuance, and a judgment rendered for the plaintiff, on an *ex parte* hearing, will not be set aside, as the defendant must be deemed to have voluntarily abandoned the cause. *Baldwin v. Carter*, 496
12. Where a cause in a justice's Court

is adjourned to a future day, at a certain hour, when the parties attend, and the justice, for his own convenience, and with the consent of the defendant, delays the trial, and when he is ready to try the cause, informs the defendant that he intended to bring it on, who voluntarily absents himself, the delay does not amount to a discontinuance, and a judgment rendered for the defendant on an *ex parte* trial is not erroneous. *Myer v. Fisher*, 504

VI. Judgment and costs.

13. Where a justice, in giving judgment for a plaintiff in a suit before him, includes costs incurred on the part of the defendant, the judgment will be reversed as to the costs. *Williams v. Sherman*, 195
14. Where a cause in a justice's Court, having been adjourned, became discontinued by the non-appearance of the plaintiff at the adjourned day, and more than a month after, a person who had been authorized by the defendant to appear for him at the adjourned day, and confess judgment, came before the justice, and without the knowledge of the defendant, confessed a judgment to the plaintiff, as of the day to which the cause was adjourned, it was held, that, this judgment being void, the defendant might avail himself of the irregularity in an action upon it. *Hubbard v. Spencer*, 244
15. A justice of the peace can in no case enter a judgment by confession against a defendant, unless on his appearance in Court, either in person or by attorney, or where he has been duly summoned; although the defendant authorize the justice to enter judgment against him by writing under seal, and his signature is proved before the justice by the subscribing witness. *Bromaghin v. Thorp*, 476

Error upon judgment, *vide CERTIORARI TO A JUSTICE'S COURT.*

VII. Execution.

16. A person who has been imprisoned more than thirty or sixty days, as the case may be, on execution issued on a judgment recovered before a justice of the peace, and recorded with the clerk of the county, under the *act extending the jurisdiction of justices of the peace*, (sess. 41. c. 94.) is entitled to his discharge, on the usual affidavit as to his imprisonment, according to the provisions of the *act for the recovery of debts to the value of 25 dollars*, passed the 5th of April, 1813, all the provisions of which act are applicable to the act above mentioned, (sess. 41. c. 94.) except so far as it has otherwise directed. *Matter of Harwood*, 397

VIII. Attachment against absent and absconding debtors.

17. Where a person was passing through a county other than that in which he resided, and a justice of that county issued an attachment against him under the 23d section of the *act for the recovery of debts to the value of 25 dollars*, (1 N. R. L. 398.) the proof on which it was issued being that a warrant had been issued by the justice against the defendant, the service of which he had avoided; and a copy of the attachment was served by leaving it at a store, at which the defendant had been a short time before; it was held, that the provisions of the act did not apply to a case of this kind, and that the proof on which the attachment was issued, and the service of the copy, were insufficient. *Dudley v. Staples*, 196

COURTESY.

Vide COLONIAL LAWS, 3.

D.

DAMAGE-FEASANT.

Vide DISTRESS.

DAMAGES.

1. In an action for the non-delivery of goods pursuant to a contract of affreightment, the measure of damages is the value of the goods at the port of destination. *Amory and others v. M'Gregor*, 24
2. But interest ought not to be allowed, unless there has been fraud or gross misconduct on the part of the defendant. *ib.*
3. Where parties, by covenant, bind themselves to each other, in the sum of 500 dollars, which they thereby consent to fix and liquidate as the amount of damages to be paid by the failing party, for his non-performance, to the other, the sum thus agreed to be paid, is to be considered as stipulated damages. *Hasbrauck v. Tappen*, 200

DEBT.

On statute, *vide* ACTION ON STATUTE.

On bond for gaol liberties, *vide* GAOL LIBERTIES.

DEBTOR.

Imprisoned, *vide* COURTS OF JUSTICES OF THE PEACE, VII. 16.

DECLARATIONS.

In extremis, *vide* EVIDENCE, IV. 12.

DEED.

- I. *Execution, delivery, and construction of deeds.*
- II. *When void.*

I. *Execution, delivery, and construction of deeds.*

1. Where the certificate of a justice of the peace, in 1711, of the acknowledgment of a deed, stated, that A., and B., his wife, came before him "to acknowledge this indenture to be their acts and deed," it was held that the certificate could not be understood to mean merely that the parties came before the justice to acknowledge the deed, or with such an intent; but, further, that they did acknowledge it; and that, after such a lapse of time, the private examination of the wife ought to be presumed; and that the estate acquired under a deed thus acknowledged, was confirmed by the act of 1771. *Jackson, ex dem. Woodruff and others, v. Gilchrist*, 89
2. The statute of 1771, "to confirm certain ancient conveyances," provided, that no claim to any real estate, whereof any person was then actually possessed, should be deemed to be void upon the pretence that the *feme covert*, granting the same, had not been privately examined; it seems, that in respect of new and unsettled lands, the constructive possession arising from the right of property, is sufficient to satisfy the words of the act, such possession being sufficient in other cases; as, to entitle the husband to an estate by the courtesy, or to enable the owner to maintain trespass. *ib.*
3. Whether before the colonial act of 1771, the interest of a *feme covert* in land could, in this state, be conveyed, otherwise than by fine? *Quære.* *ib.*

4. If a person, on whose land a highway is laid out, convey the land on each side of it, describing it by such boundaries as do not include the road, or any part of it, the property in the road does not pass to the grantee, as it is excluded by the description in the grant; and it cannot pass as an incident, being in itself a distinct parcel of land; and the fee of one piece of land not mentioned in a deed cannot pass as appurtenant to another. *Jackson, ex dem. Yates and others, v. Hath way,* 447
 - 5 Where land is described as bounded along a highway, or upon a highway, or running to a highway, it may be intended that the parties mean the middle of the highway. *S. C. Per Platt, J.* 454
 - 6 A mere easement may, without express words, pass as an incident to the principal object of the grant. *S. C. Per Platt, J.* 454
 - 7 Where two instruments relating to the same subject, are executed at the same time, they are to be taken in connection as parts of the same agreement; as where a conveyance of land, and a mortgage to secure the purchase money, are executed at the same time; the effect of which transaction is, that if the price of the land shall not be paid at the stipulated time, the grantor shall be resealed of the land, free of the mortgage: and whether such an agreement be contained in one and the same instrument, as it well may be, or in distinct instruments, can make no difference as to the effect. *Stow v. Tift,* 458
 - 8 Where land is leased, and is described in the lease by metes and bounds, and as containing a certain number of acres, the description by metes and bounds controls the quantity, and the lessee is entitled to hold all the land embraced by the description, although exceeding the number of acres expressed in the deed: *Jackson, ex dem. Livingston, v. Barringer,* 471 478
 9. So, where there is a lease of the farm on which *A. B. now lives, to contain 80 acres*, and the farm actually contains more than 80 acres, the lessor cannot recover more than the surplus from the lessee; especially where he has been in possession, and paid rent for a length of time. *id.*
- Acknowledgment of feme covert, *vide* BARON AND FEME.
- II. When void.
10. An alteration, whether material or immaterial, made in a deed or will, by a person claiming under it, renders it void; but whether a material alteration by a stranger has that effect? *Quære. Jackson, ex dem. Malin, v. Malin,* 293
- Vide* FRAUDULENT SALES AND CONVEYANCES, 1, 2, 5, 6, 7, 8.
- DELIVERY.
- Of goods to consignee, *vide* COMMON CARRIER.
- DEVISE.
1. Where *A.* devises all his estate to *B.*, his wife, her executors, administrators, and assigns, but in case of *B.*'s death without disposing of it by will or otherwise, then to his daughter; *B.* takes under the devise the entire fee, and the subsequent limitation to the daughter is consequently void. *Jackson, ex dem. Livingston and others, v. Robins,* 169
 2. The testatrix devised as follows "I give and bequeath to my daughter *E. R.* all my property in *W.* in the state of *Connecticut*. All the land deeded me by *B.*, excepting 1000 acres of land, I deed to *R. M.* Also, the receipts that I now

bold, &c.; also, as to personal property, I give her one mare, &c." And by a subsequent clause she devised those 1000 acres to *R. M.* It was alleged that the word *also* had been erased between the words *Connecticut* and *all*, after the execution of the will, so as to give *R. M.* not only the 1000 acres excepted, but also the land out of which they were excepted. Held, that the alteration, if any, was perfectly immaterial, and that, whether the word *also* were inserted or not, the land deceded to the testatrix by *B.*, *excepting 1000 acres she deceded to R. M.*, (which words were to be read as if in a parenthesis,) was devised to *E. R. Jackson*, ex dem. *Malin, v. Malin*, 293

2. A devise of land held adversely to the devisor, is void; but it descends to his heir. *Smith*, ex dem. *Roosevelt and others, v. Vandeursen*, 343

DEVISE, (EXECUTORY.)

Vide DEVISE, 1.

DISTRESS.

1. The remedy by distress and sale of beasts *damage-feasant*, given by statute, sess. 36. c. 35. s. 19. (2 *N. R. L.* 134.) does not take away the common law remedy by action of trespass. *Colden v. Eldred*, 220
2. Where beasts, *damage-feasant*, have been distrained, or even impounded, the distrainer may relinquish the proceedings by distress, before satisfaction for the damage which has been sustained, and bring an action of trespass. *ib.*

DIVORCE.

1. A divorce obtained in *Vermont*, by a husband from his wife, who resided in another state, and no notice of

the pendency of the proceedings, is void, and will not legalize a subsequent marriage contracted in this state. *Bordon v. Fitch*, 121

DOWER.

1. Where *A.* and *B.* purchased a piece of land, and divided it between them, and *A.*, being in the exclusive occupation of his part, sold it to *D.*, but both *A.* and *B.* joined in the conveyance, it was held, that although the deed from *A.* and *B.* might be *prima facie* evidence that they were tenants in common of the part conveyed, yet that the occupation of the land by *A.*, and the defendant's purchasing it of him exclusively, were evidence of *A.*'s seisin of the whole, so as to entitle *A.*'s widow to dower out of the whole of his part of the land originally purchased by *A.* and *B.*, and not merely in a moiety of that part. *Dolf v. Bassett*, 21
2. Dower of land aliened by the husband in his lifetime, is to be assigned according to the value of the land at the time of alienation; and such value may be ascertained either, (1.) By the jury on the trial of the issue in the action of dower; or, (2.) By the sheriff on the writ of seisin; or, (3.) By a writ of inquiry founded on proper suggestions. *ib.*
3. Where a person, seised of land in fee, mortgages it, and afterwards marries, his widow, on his death, is entitled to dower out of the equity of redemption. *Coles v. Coles*, 319
4. Where the husband was seised of land in severalty, the widow cannot proceed under the *act for the partition of lands*, sess. 36. c. 100. (1 *N. R. L.* 507.) for the purpose of obtaining her dower; nor can she be made a party to a partition among the heirs, devisees, or grantees of her husband. *ib.*
5. But it seems, that where the hus

- band was seised as joint tenant or tenant in common of land, the widow, as her right of dower extends only to an undivided part, is a proper party to a partition among the several joint owners. *Coles v. Coles*, 319
6. Where the seisin of the husband is instantaneous, or passes from him *eo instanti* that he acquired it, his widow is not entitled to dower. *Stow v. Tift*, 458
 7. So, where land is conveyed to the husband during coverture, who, *at the same time*, executes a mortgage to the grantor to secure the consideration money, the seisin of the land is but for an instant in the grantee, and is immediately revested in the grantor, and, consequently, the widow of the grantee cannot claim her dower in the premises. *ib.*
 8. Notice, in writing, of an application to the surrogate, for the appointment of admeasurers of dower, must be given to the parties interested in the land; otherwise the proceedings will be set aside as irregular. But no costs are allowed on a motion in this Court for that purpose. *Matter of Cooper*, 533
- ancestor, the operation of the statute of limitations is not prevented by the title descending to a person under legal disability, as a *feme covert*, &c. *Jackson, ex dem. Livingston and others, v. Robins*, 169
2. Where an award settles the boundary of land, it is sufficient to enable the party to whom the land has been awarded to bring an action of ejectment. *Sellick and Sellick v. Adams*, 197
 3. Where a person acting in relation to land as executor, and, consistently with his duty as such, permits another to enter upon and occupy the land, he, or those who claim under him, cannot maintain an action of ejectment against such tenant, and his declarations, claiming the land in his own right, are inadmissible in support of the action as evidence of title; such declarations being evidence only in relation to the possession. *Jackson, ex dem. Brown and others, v. M'Vey*, 234
 4. One tenant in common may maintain ejectment against his co-tenant, though no actual ouster proved. Per *Spencer, J. Shepard v. Ryers*, 501

DURESS.

Vide BOND, 1, 2.

E.

EASEMENT.

Vide DEED, I. 4. 6.

EJECTMENT.

Title of the parties.

1. Where an adverse possession has commenced in the lifetime of the 480
3. Where a Court of Common Pleas refused leave to amend a verdict,

Vide AWARD, 4. HIGHWAY, 1. MILITARY BOUNTY LANDS. MORTGAGE, 5.

ERROR.

1. The plea of *in nullo est erratum* to an assignment of error in fact, is an admission of the facts assigned as error. *Harvey v. Rickett*, 87
2. Where a judgment of the Court of Errors, affirming a judgment of this Court, is affirmed in the Supreme Court of the *United States*, on a writ of error from that Court, interest on the judgment is allowed only to the time of rendering the last judgment of affirmance. *Hoyt v. Gelston*, 221
3. Where a Court of Common Pleas refused leave to amend a verdict,

by applying the evidence to one count, and to enter a *nol. pros.* as to the other, this Court, on a writ of error, judgment having been entered on the verdict below, cannot grant leave to amend the record.

Cooper v. Bissel, 318

4. It seems that a Court of Errors cannot grant an amendment by inquiring into facts *dehors* the record. *ib.*

5. Whatever is a good cause for arresting a judgment, is a good cause also for reversing it. *Gage v. Reed and another*, 404

6. Where, in error to a Court of Common Pleas, the judgment below was *revoked* for error of fact, to wit, the infancy of one of the defendants; the plaintiff in error was held entitled to costs under the 13th section of the act, (sess. 36. c. 96. 1 N. R. L. 343. 346.) it being substantially a *reversal* of the judgment; and in such case the defendant below may be ordered to appear and plead *de novo* to the declaration removed into this Court; having refused to rejoin to the assignment of errors, after leave given for that purpose on withdrawing a demurrer. *Arnold and others v. Sandford*, 534

ESCAPE.

1. Where a defendant, taken in execution, is discharged from imprisonment under the act for the relief of debtors with respect to the imprisonment of their persons, and being sued on the original judgment, omits to plead his discharge, and is taken in execution in the second suit, his discharge is no justification in an action against the sheriff for an escape. *Cuble v. Cooper*, 152

2. And if the prisoner, having been taken in custody on the second suit, be discharged by a judge or commissioner, on *habeas corpus*,

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such discharge is no protection to the sheriff in an action for an escape. *ib.*

3. The sheriff is never allowed to allege error, either in the judgment or process, as an excuse for an escape; and if he arrests the party, he is bound to keep him until he is discharged by due course of law. S. C. Per *Van Ness, J.* 155

4. Where a sheriff voluntarily permits a defendant in execution to escape, he cannot arrest or detain him, unless the plaintiff in the execution issues a new process; nor can he retain him on his surrender, unless the plaintiff in the execution does some act showing his election to hold him on the old process. *Thompson v. Lorkwood*, 256

5. If the sheriff arrest the defendant again on the same execution, and take from him a bond for the gaol liberties, jointly and severally with another person, as his surety, such bond is void for duress, not only as to the defendant, but also as to the surety. *ib.*

6. Where an attorney, having a lien on a judgment recovered by his client for nominal damages and costs, or an assignee having an equitable interest in the judgment, takes out a *ca. sa.*, giving the sheriff notice of his equitable interest, and the sheriff, having arrested the defendant, suffers him to escape, the party beneficially interested may maintain an action against the sheriff for the escape, in the name of the plaintiff in the original suit, which the sheriff cannot defeat by taking a release from the nominal plaintiff. *Martin v. Hawkes*, 405

EVIDENCE.

- I. *Matter of record, and proceedings of Courts.*
- II. *Written evidence and parol evidence in relation thereto.*
- III. *Confessions and declarations*

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IV. *Hearsay.*V. *Presumptions.*VI. *Competency of witnesses.*VII. *Examination of witnesses.*I. *Matter of record, and proceedings of Courts.*

1. A judgment rendered by a Court of another state, which has jurisdiction neither of the subject of the action, nor the person of the defendant, is void, and will not be enforced in the Courts of this state. *Borden v. Fitch*, 121
2. A judgment rendered in another state against a defendant who never appeared, and had no notice of the proceedings, is void. *ib.*
3. A judgment or decree obtained on false or fraudulent suggestions, is void, and may be impeached by the party against whom it is sought to be enforced. *ib.*
4. It seems, that a judgment obtained in the Courts of another state, having jurisdiction of the subject of the suit, and in which the defendant has been duly notified to appear, is conclusive in the Courts of this state. *ib.*

Patent, *vide* MILITARY BOUNTY LANDS.

5. A. devises a farm to his wife during her widowhood, and the remainder to his children; B., claiming under a deed of the land from A., brings an action of ejectment against the widow and another person, in which he recovers on proof of the existence and contents of the deed from A., which was lost, or otherwise could not be produced, and goes into possession under this recovery. After the death of the widow, C., claiming as the grantee of some of the devisees in remainder of A., brings an action of ejectment against B., and on the trial B. produces the record of the former recovery by him, and offered evidence of what had been sworn to, on the

trial in that suit, by a witness since deceased, whose testimony went to establish the existence of the deed from A. to B. Held, that the evidence was admissible; that the widow, and the remainder men, from whom C. derived his title, and who all claimed under the will of A., were privies in estate; and that the evidence of a deceased witness, in a former suit, is testimony, not only where the same point in issue afterwards arises between the same parties, but also for B. against persons standing in the relation of privies in blood, privies in estate, or privies in law. *Jackson, ex dem. Bates, v. Lawson*, 539

II. *Written evidence and parol evidence in relation thereto.*

6. It seems that a register of marriages and births, kept in the records of a town, is evidence of pedigree and heirship. *Jackson, ex dem. Miner, v. Boneham*, 226
7. A ship's register is not evidence of the ownership of the person in whose name it stands. *Leonard and M'Cartee v. Huntington and another*, 302

III. *Confessions and declarations.*

8. In an action by a creditor against the heirs and devisees of the debtor, some of the defendants being also his executors, and who had petitioned the surrogate for the purpose of obtaining a sale of the debtor's real estate, on account of an alleged deficiency of personal assets, the admission of the executors, made in their application to the surrogate, is evidence against all the defendants, to show the insolvency of the debtor, so as to avoid his previous voluntary conveyance, and repel the plea of *riens per descent or devise*

Mankattan Company v. Osgood and others, 162

9. The defendant's confession that he had purchased the goods, but had paid for them, is not sufficient to entitle the plaintiff to recover in an action for the price. *Smith v. Jones,* 229
10. An admission by one partner, after dissolution of the partnership, of a balance due from the firm, does not bind the firm; but entries made by one of the partners during the partnership, in a book of accounts, are admissible evidence against both. *Walden and Walden v. Sherburne and Eakin,* 409
11. If a party in a cause, to substantiate a credit in his own favor, produce an account made out by the opposite party, he renders it evidence against himself in the first instance; but he is still at liberty to disprove the charges in the account. *ib.*

Vide EJECTMENT, 3.

IV. Hearsay.

12. Hearsay is admissible as evidence of the death of a person. *Jackson, ex dem. Miner, v. Boneham,* 226
13. The declarations, in *extremis*, of a person who could, if living, be a competent witness, are inadmissible evidence, either in a civil action or a criminal prosecution, with the single exception of cases of homicide, when the declaration of the deceased, after the mortal blow, as to the fact of the murder, is admitted. *Wilson v. Boerum,* 236
14. The admissions and declarations of a person who is himself a competent witness, cannot be given in evidence. *Woodard v. Paine and Lake,* 493

V. Presumptions.

15. A receipt for rent arising at a subsequent period, is presumptive evi-

dence, that all rent previously accruing had been paid. *Decker v. Livingston and others,* 479

VI. Competency of witnesses.

16. In actions for torts against several defendants, who join in pleading the general issue, if there is no evidence against one of the defendants, the Court ought to discharge him on the trial, that his co-defendants may have the benefit of his testimony. *Van Deursen and Van Deursen v. Van Slyck and Wife,* 223
17. There is a warranty implied in the transfer of any negotiable instrument that it is not forged; therefore the payee of a note is not a competent witness for the holder, in an action against the maker, although the holder took it at his own risk, as to the solvency of the maker; the payee having a direct interest to charge the maker, in order to protect himself against his implied warranty. *Herrick v. Whitney and others,* 240
- A party to a negotiable instrument is inadmissible as a witness, to show it void at the time of its execution; but he is competent to testify as to facts subsequently arising, which go to defeat the recovery of the holder. *Skidding and Haight v. Warren,* 270
19. On an appeal from an order of removal, the Court of Sessions ought not to compel one of the overseers of the poor, who is a party to the appeal, to testify; but this is, notwithstanding, not a ground for reversing their order, as the proceedings were not before a jury, and this Court will reject the evidence improperly given. *Overseers of Plattskill v. Overseers of New Paltz,* 305

VII. Examination of witnesses.

20. Improper evidence ought not to be allowed to be given in the presence 483

of the jury, although they are afterwards directed to disregard it.
Irvine v. Cook, 239

EXECUTION.

1. An inquisition taken by a sheriff on a claim of property, in goods levied on under an execution, is not conclusive of the right of property, although it may excuse the sheriff for not proceeding to sell, and for returning *nulla bona*. *Van Cleaf and others v. Fleet*, 147

2. But if the plaintiff, in the execution, offer in writing to indemnify the sheriff, he is bound to proceed and sell, and cannot excuse himself by taking an inquisition. *ib.*

3. Where a debtor confesses judgment, and afterwards fraudulently purchases, and procures to be delivered; goods, without paying for them, with intention to subject them to the execution of the judgment creditor, the title to the goods does not become vested in the purchaser, and they, therefore, cannot be taken on an execution against him. *ib.*

4. Where an execution against one partner is levied on the partnership property, the sheriff seizes all, and not a moiety of the goods sufficient to cover the debt, and sells a moiety thereof undivided, and the vendee becomes a tenant in common with the other partner. *Mersereau v. Norton*, 180

5. A sheriff's deed relates back to the time of sale, although not executed until after the day of sale. *Jackson, ex dem. Noah, v. Dickenson and Thompson*, 309

6. *P.* was seised of two farms which were bound by a judgment to *S.* One of the farms *P.* afterwards sold to *W.*, and the other to *T.*, who, for part of the consideration money, gave *P.* a bond, conditioned to pay off and discharge the judgment against *P.* *T.* neglected to pay off the judgment, and procured

R. to advance the money, for the balance due on it, and take an assignment of his security; and, afterwards, the judgment was assigned to the son of *T.*, who issued an execution thereon, which he caused to be levied on the farm which *W.* had purchased of *P.* On motion of *W.*, a rule was granted to stay proceedings on the execution, as it respected the farm of *W.*, until the further order of the Court. *Smith v. Page*, 395

7. Where a creditor levies, under an execution, upon the property of his debtor, consisting of a ponderous article not easily removable, and allows it to continue in his possession, this is not, *per se*, evidence that the execution and levy were fraudulent, so as to render the property liable to be levied on, under a junior execution against the same debtor; but if the creditor permit the debtor to consume the property, being firewood, this is a ground for suspicion of fraud; and to prove the fraud, the creditor in the junior execution may produce evidence of a permission given to the debtor to use other property levied upon at the same time. *Farrington and Smith v. Sinclair*, 423

8. If the officer who made the first levy, brings an action of trover against the parties who were engaged in the second levy, they may show circumstances of fraud to defeat the action, equally as if it had been brought by the creditor himself. *ib.*

9. If the creditor in the prior execution levy upon provisions belonging to his debtor, and permit them to remain with the debtor, and be consumed in his family, the execution and levy are constructively, if not actually, fraudulent, as against a subsequent attachment or execution. *Farrington and Smith v. Sinclair*, 420

10. Where a party purchasing goods levied upon under an execution

which he has issued, suffers them to remain in the possession of his debtor, this is *prima facie* evidence of fraud as against a subsequent execution. *Farrington and Smith v. Caswell*, 430

11. Where the creditor in the prior execution brings an action of trover against the parties engaged in the subsequent levy, under a junior execution, they may, to establish the fraud, produce evidence that the plaintiff permitted other property of the debtor, levied upon at the same time with that which is the subject of the action, to continue in his possession. *ib.*

12. If an officer, having an execution, pay the amount to the plaintiff with his own money, or with money raised by the defendant and officer on their joint credit, the judgment is satisfied, and the officer cannot afterwards enforce the execution against the defendant for his own indemnity, notwithstanding an agreement between them that the execution should continue in life in the hands of the officer. *Sherman v. Boyce*, 443

13. An action on the case will lie against a sheriff for not returning an execution, or the party may proceed by attachment, at his election. *Birk v. Campbell*, 456

14. In an action on the case against a sheriff for not returning a writ of *fi ri facias*, a plea that the sheriff had never been ruled to return the writ, is bad, for a sheriff is bound to return a writ, without being ruled, and he cannot avail himself of his own neglect of duty to defeat the plaintiff's action. *ib.*

Vide ASSIGNMENT. ESCAPE.

EXECUTORS AND ADMINISTRATORS.

Vide EJECTMENT, 3. EVIDENCE, III. 7.
PLEADING, III. 13.

EXTINGUISHMENT.

Vide PAYMENT.

F.

FORMER RECOVERY.

When a bar, *vide* ACTION, 2.

FRANCHISE

Vide QUO WARRANTO. INFORMATION

FRAUDS, (STATUTE OF.)

1. A parol agreement to extend the time of performance of a contract for the conveyance of land, is void. *Hasbrouck v. Tappen*, 200
2. In an action of *assumpsit*, where the declaration sets forth an agreement to answer for the debt, default, or miscarriage of a third person, the defendant, may plead the statute of frauds, specially, in bar. *Myers and Bellinger v. Morse*, 425
3. Where the plaintiff promises not to require from the defendant the payment of a certain note, in consideration of which, the defendant promises to indemnify the plaintiff from one third of all loss in consequence of his endorsement of certain notes for a third person, this is not a case within the statute of frauds, here being a new and original consideration moving between the contracting parties. *ib.*
4. An agreement for the exchange of lands is within the statute of frauds, and must be in writing; and, therefore, where, on a parol agreement for such exchange, the plaintiff delivered to the defendant the promissory note of a third person, as a pledge to be forfeited in case

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of the plaintiff's non-compliance with the agreement, and the defendant received payment of the note, the plaintiff may recover the amount from the defendant, the delivery of the note being without consideration. *Rice v. Peet*, 503

FRAUDULENT SALES AND CONVEYANCES.

1. A voluntary conveyance by a grantor, who is, at the time of making it, insolvent, is void, as respects creditors; and the land, after the death of the grantor, is assets by descent or devise, in the hands of his heirs, or the devisee of the residuum of his estate, in an action by the creditor against the heirs and devisees; and where some of the defendants were also the executors of the grantor, and petitioned the surrogate for the purpose of obtaining a sale of the real estate of the grantor, on account of an alleged deficiency of personal assets, this is evidence against the defendants to show the insolvency of the grantor. *Manhattan Company v. Osgood and others*, 162

2. A., in 1810, conveyed a lot of land to B. for the purpose of qualifying him to be a voter, no consideration being paid, and A. still remaining in possession. An action for a tort was afterwards commenced against B., and during its pendency, in 1814, B. reconveyed the lot to A. A judgment was obtained against B., and the lot was sold under execution. Held, in an action of ejectment brought by the purchaser, against the tenant in possession, that the reconveyance, not being made to defraud creditors, was not void by the statute of frauds; nor could it be avoided by the purchaser under the execution, although a purchaser for valuable consideration; for those voluntary deeds, which the statute avoids as to a subsequent purchaser, must

have been made with intent to deceive, the evidence of which is the voluntary conveyance coupled with a subsequent agreement to sell, which cannot be the case, where the purchase is made, not of the party, but through the intervention of the law. *Jackson*, ex dem. *Van Allen*, v. *Ham*, 261

3. Notice of a *lis pendens* in chancery, to affect a subsequent purchaser, commences with the service of the *subpœna*. *Jackson*, ex dem. *Noah*, v. *Dickenson and Thompson*, 309

4. A debtor in insolvent circumstances, may lawfully prefer one creditor, or set of creditors, to another. *Murray v. Riggs and others*, 571

5. A., on the 23d of March, 1798, assigned property to B., in trust, to pay B. and other creditors, with power of revocation, and to appoint new trusts; and on the 24th of March, 1798, the 21st of March, 1799, and the 22d of March, 1799, executed other assignments to B., all in relation to the same subject, and all reserving a like power, and on the 21st of May, 1800, executed an irrevocable deed to B. in trust. The late bankrupt law of the United States afterwards came into operation, and A. was declared a bankrupt. His assignees filed a bill against B. to set aside the several assignments, and to account for the property received by him. Held, that although the revocable deeds might have been avoided by a person previously obtaining a title from A., yet that the deed of 1800 was valid, and might be taken in connection with the first deed, and the other deeds might be laid out of the question, and, therefore, that the assignees under the bankrupt law, whose title subsequently accrued, could not impeach it; and that, taking all the deeds together as parts of one transaction, the four first could only be regarded as voidable by creditors, and no rights of creditors having inter

vened, they were capable of confirmation, and were, in fact, confirmed by the deed of 1800. *ib.*

6. A deed fraudulent in part, is void, and incapable of confirmation; but a deed constructively fraudulent, as being contrary to the policy or provisions of a particular statute, is voidable only, and may be confirmed by matter *ex post facto*. *ib.*

7. An assignment of property in trust, by a debtor, with power of revocation, is fraudulent only as regards judgment creditors, or such as are taking measures to obtain payment of their debts. *ib.*

8. A reservation in an assignment in trust for the payment of debts, of a sum for the maintenance of the assignors, does not render the assignment void; though, in case of a deficiency, the creditors are entitled to have the part reserved applied in satisfaction of their debts. *ib.*

FREIGHT AND CHARTER-PARTY.

1. Goods were laden on board of a vessel to be transported from *Richmond* to *New-York*. The vessel proceeded on her voyage in the beginning of *February*, but finding the *Chesapeake* blockaded by a hostile squadron, and that it would be impossible to put to sea without being captured, went into *Norfolk*, and, finally, returned to *Richmond*. In *September* following, the plaintiffs demanded their goods, in order to transport them to *New-York* by land; but the master refused to deliver them unless on being paid half freight, and a few days thereafter, the vessel, with the goods on board, was totally lost, without the default of the defendants or the master, the blockade having continued until that time: Held, that the defendants had no claim, for freight, the voyage not having been performed; and that more than a reasonable time for sending on the

goods having elapsed, they had no right to retain them, and were liable to the plaintiffs for their value, notwithstanding they were lost by an inevitable accident *Lorillard v. Palmer and others*, 14

2. The ship owner is bound to deliver the goods to the consignee within a reasonable time; and it is only on the delivery of them that he is entitled to freight. If he is unwilling or unable to forward them, the freighter is entitled to receive them back without paying any freight. *ib.*

3. Where the completion of the voyage is prevented by a permanent blockade, and the vessel is unable to put to sea, and she returns after having proceeded to the mouth of the bay, on which her port of lading is situated, the ship owner is not entitled to freight *pro rata*, and the freighter is entitled to receive his goods, without paying freight, the blockade putting an end to the contract. *ib.*

4. By the blockade of the port of discharge, a charter-party is dissolved, and all claim to freight under it is gone. *S. C. Per Thompson, Ch. J.* 20

5. In an action for the non-delivery of goods pursuant to a contract of affreightment, the measure of damages is the value of the goods at the port of destination; but without interest, unless there has been fraud or gross misconduct on the part of the defendant. *Amory and others v. M'Gregor*, 24

6. Where the whole of a vessel is chartered to take a cargo at certain specified rates per ton, square foot, &c., if the freighter does not furnish a full cargo, the owner of the vessel is entitled to freight, not only for the cargo actually put on board, but also for what the vessel could have taken had a full cargo been furnished. *Duffie v. Hayes*, 327

7. Where a vessel is chartered for a voyage out and home, for an entire sum of money, to be paid on her

return, her return is a condition precedent to entitle the owner to freight, and if she is lost before commencing the homeward voyage, he can recover neither on the charter-party nor on an implied *assumpsit* for the freight of the outward voyage; nor if the freighter had accepted the outward cargo, would he be entitled to a *pro rata* freight. *Penoyer and Luff v. Hallett*, 332

G.

GAMING.

In an action under the 2d section of the act to prevent gaming, (sess. 24. c. 46. 1 *N. R. L.* 153.) by the losing party against the winner, to recover back money lost at play, and paid, the plaintiff may declare generally in debt for money had and received, without stating his case specially, or referring to the statute; but it is otherwise in the case of an action brought by a common informer. *Collins v. Ragrew*, 5

GAOL LIBERTIES.

In an action on a bond given for the gaol liberties, judgment for the plaintiff is to be for the whole penalty; but he cannot have execution for more than the original debt, with interests and costs. *Sprague and another v. Seymour*, 474

GRANT.

Vide DEED, I.

GUARANTY.

Vide ASSUMPSIT, 4.
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H.

HABEAS CORPUS.

1. It seems that the *habeas corpus* act does not apply to cases of imprisonment on civil process. *Cable v. Cooper*, 152
2. But where a debtor in execution is discharged from imprisonment under the act for the relief of debtors with respect to the imprisonment of their persons, and is again imprisoned on an execution issued in a suit founded on the original judgment, a judge or commissioner has no authority to discharge him under the *habeas corpus* act, and a discharge granted under such circumstances is no protection to the sheriff in an action for an escape. *ib.*
3. A discharge under *habeas corpus*, in a case in which the judge has no jurisdiction, is void. *S. C.* Per *Van Ness, J.* 156

HEARSAY.

Vide EVIDENCE, IV.

HEIRS AND DEVISEES.

Vide EVIDENCE, III. 7.

HIGHWAY.

1. Where a highway is laid out over the land of a private person, the public acquires no more than a right of way, or easement, and the title of the original proprietor still continues; he may use the land in any manner not inconsistent with the public right; is entitled to all mines, &c., and may maintain trespass or ejectment in relation to it. *Jackson, ex dem. Yates and others, v. Hathaway*, 447
2. If a person over whose land a highway is laid out convey the

land on each side of it, describing it by such boundaries as do not include the road or any part of it, the property in the road does not pass to the grantee, as it is excluded by the description in the grant; and it cannot pass as an incident, being in itself a distinct parcel of land, and the fee of one piece of land not mentioned in a deed, cannot pass as appurtenant to another. *ib.*

3. Where an old road, the fee of which is in one person, is discontinued, and a new road laid out over the land of another person, which land is contiguous to the old road, the proprietor of the land is not entitled to the old road, as a compensation for the land taken for the new road, under the 17th section of the *act to regulate highways*, (sess. 36. c. 33. 2 *N. R. L.* 275.) which only applies where another road is substituted over the land of the same proprietor. *ib.*

4. It is not a breach of the covenants, that the grantor was lawful owner of the land, was well seised, and had full power to convey, that part of the land was a public highway, and was used as such; a public highway being a mere *easement*, and the seisin and right to convey still continuing in the owner of the land over which it was laid out. *Whitbeck v. Cook and Wife*, 433

5. On an appeal from the decision of commissioners of highways, to three of the judges of the Court of Common Pleas, under the 36th section of the *act to regulate highways*, (sess. 36. c. 33. 2 *N. R. L.* 232.) if the decision of the commissioners is reversed, a *certiorari* will lie on the behalf of the commissioners, to remove the proceedings into this Court; the right to bring a *certiorari* being reciprocal, and belonging as well to the commissioners as to the appellants. *Commissioners, &c. of Kinderhook v. Claw and another*, 537

6 On an appeal from the decision of commissioners of highways, rela-

tive to laying out, altering, &c., a highway, the appellant must give notice of the appeal to the commissioners, and if such notice is not given, the commissioners may bring a *certiorari*, on which the proceedings on the appeal will be reversed. *ib.*

7. It is not sufficient that notice was given to the town clerk. *ib.*

Action against overseers of highways for negligence, *vide* ACTION ON THE CASE, 5, 6, 7.

I.

INDIANS.

1. A conveyance by an *Oneida Indian* in 1791, being previous to the act of the 4th of April, 1801, (see the *act relative to the Indians within this state*, passed 10th of April, 1813, sess. 36. c. 92. 2 *N. R. L.* 158.) of land of which he was seised in his individual capacity, and distinct from his tribe, as the heir of an *Indian* to whom it was granted by the state, for his services during the revolutionary war, is valid, although made without special authority from the legislature, and without the approbation of the surveyor-general. *Jackson, ex dem. Gillit and others, v. Brown*, 264

2. The approbation of the surveyor-general to the deed of an *Indian* patentee or his heirs, in pursuance of the 55th section of the act, (sess. 36. c. 92. 2 *N. R. L.* 172.) to a deed that is void and inoperative, does not preclude him from afterwards giving his assent to a valid and operative deed from the same grantor, for the same land. *ib.*

3. The endorsement of his approbation on the deed, needs not state his reasons for giving it. "I approve of the within deed," is sufficient. *ib.*

INFANCY.

Vide ERROR, 6.

INFORMATION.

Vide QUO WARRANTO. INFORMATION

INQUISITION OF PROPERTY.

Vide EXECUTION, 1, 2.

INSANITY.

Of party contracting, *vide* AGREEMENT, 5.

INSOLVENT.

1. A petitioning creditor's affidavit, stating that the insolvent was indebted to him on a note of hand, given on a settlement of accounts, is insufficient; it should set forth the nature of the account on which the settlement took place, or the general ground of indebtedness. *Matter of Cook*, 183
2. The endorser of a promissory note, who, after his endorsement, and before the note becomes payable, obtains his discharge as an insolvent, is not protected from payment of the note; the endorsement not creating a certain debt, but merely a liability contingent on the non-payment of the note by the maker, and which liability could not become fixed until after the discharge. *Mechanics' and Farmers' Bank v. Capron*, 467
3. Nor does it vary the case, that the note was given by the endorser as collateral security for a debt due the holder, which was barred by the discharge. *ib.*

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4. If the creditor, at the time of the assignment by the insolvent debtor, has not a certain debt due or owing to which he can attest by oath, so as to entitle him to a dividend of the insolvent's effects, he will not be barred by the discharge. *ib.*

INSURANCE.

- I. *Policy, when valid or void.*
- II. *Abandonment and loss.*

I. *Policy, when valid or void.*

1. Where an insurance was effected, during the late war with *Great Britain*, on goods from *Norfolk* to *Lisbon*, and the policy contained a warranty that the vessel should have a genuine *British license* on board, and the vessel sailed with, and had such license on board at the time of the loss: Held, that as the taking of such license was unlawful, and subjected the vessel to forfeiture, the policy was void. *Colquhoun and others v. New-York Fireman Ins. Co.* 452
2. If, after the commencement of the voyage insured, a war breaks out between the country to which the property belongs and a foreign country, the policy is not vacated, and the insurers are liable for a loss arising out of the state of war. *Saltus and others v. The United Ins. Co.* 523

II. *Abandonment and loss.*

3. Where a vessel, in the prosecution of the voyage insured, puts into a port, at which she is permitted by the policy to stop, and whilst there the place is closely invested by the cruisers of the enemy of the country to which she belongs, so that if she attempted to escape, she would inevitably be captured, this is a re-

straint of princes or of men-of-war, within the risks enumerated in the policy, and the insured may break up the voyage, and abandon for a total loss, although there is no direct application of physical force to the subject; and such abandonment is not liable to the objection that it is made *quia timet*. *Saltus and others v. The United Ins. Co.* 523

INTEREST.

1. In an action for the non-delivery of goods, the jury may give interest by way of damages. *Amory and others v. M'Gregor*, 38
2. Interest is due on a balance of account from the time it is liquidated; and it is to be considered as liquidated when rendered, if no objections be made to it. *Walden and Walden v. Sherburne and Eakin*, 409

Interest on affirmance of judgment, *vide* ERROR, 2.

J.

JUDGMENT.

- I. *Priority and lien of judgments and executions.*
- II. *Arrest of judgment.*

- I. *Priority and lien of judgments and executions.*

- 1 A judgment will attach on lands of which the judgment debtor becomes seised at any time posterior to the judgment, unless his seisin were instantaneous, and departed from him *eo instanti* that he acquired it. Per *Spencer, J. Stone v. Tiff*, 453

Vide EXECUTION, 7, 8, 9, 10, 11.

II. *Arrest of judgment.*

2. Where a count in a declaration contains a sufficient cause of action, connected, however, with matter insensible and void, or not actionable, it will be intended after verdict for the plaintiff, that damages were given for the part only that is actionable, and the judgment will not be arrested. *Burden v. Fitch*, 121

Applying verdict to good counts, *vide* AMENDMENT, 1, 2.

Vide ERROR, 5.

Effect and validity of judgments, *vide* EVIDENCE, 1.

Judgment of Courts in another state, *vide* EVIDENCE, I. 1, 2. 4.

Satisfaction of judgment, *vide* EXECUTION, 12.

JURY.

1. Where jurors agree, each one to mark down the sum he thinks proper to find as damages, and then to divide the total amount of those sums by the number of persons composing the jury, which result should be their verdict, a verdict thus found is irregular, and will be set aside. *Harvey v. Rickett*, 87
2. Where a jury has been impanelled before Sunday commences, their verdict may be received on Sunday. *Hoghtaling v. Osborn*, 119
- S. P. *Butler v. Kelsey*, 179
4. But it is otherwise in the case of a jury summoned on a writ of inquiry. *Butler v. Kelsey*, 177
5. Where the judge directed the jury to declare, by their verdict, whether a will had been altered after its execution, and if so, by whom, and 491

they declared by their verdict that the will had been altered *by some interested person*, the verdict was held to be uncertain, and a new trial was granted. *Jackson, ex dem. Malin, v. Malin*, 293

6. The affidavits of jurors are admissible to show that a mistake has been made in taking their verdict, and that it was entered differently from what they intended. *Jackson, ex dem. Noah, v. Dickenson and Thompson*, 309

L.

LANDLORD AND TENANT.

Vide RENT.

LEASE.

1. Where a lessee for lives covenanted *not to sell, dispose of, or assign his estate in the demised premises*, without the permission of the lessor, &c., and the lease contained a clause of forfeiture for the non-performance of covenants, it was held, that a lease of part of the premises by the lessee for 20 years, was not such a breach of the covenant as would work a forfeiture; and that nothing short of an assignment of his whole estate, by the lessee, would produce a forfeiture of the lease. *Jackson, ex dem. Stevens and others, v. Silvernail*, 278
2. Nor would a sale of the whole premises, under a judgment and execution against the lessee, work a forfeiture, there being no evidence of any fraud or collusion on the part of the lessee. *ib.*

Vide DEED, I. 8, 9. RENT.
492

LIEN.

Attorney's lien for his costs, *vide ATTORNEY, 2, 3.*

Lien of judgments and executions, *vide JUDGMENT, 1.*

LIMITATION OF ACTION.

1. The promise of one joint debtor, to pay a debt barred by the statute of limitations, is sufficient to take the case out of the statute. *Johnson v. Beardslee and others*, 3
2. In an action against the heirs and devisees of a deceased debtor, a promise, by two of the defendants, who were also his executors, to pay the debt, was held sufficient to charge all the defendants. *ib.*
3. It seems, that an acknowledgment of the debt, unaccompanied with a protestation against the payment of it, is evidence sufficient for the jury to presume a new promise. *ib.*
4. Where the defendant admits that he has received the money which the plaintiff claims, but denies the validity of the claim, such acknowledgment is not evidence of a new promise, so as to take the case out of the statute of limitations. *Sands v. Gilston*, 511
5. Where the defendant says, that if the plaintiff has a claim, either in law or equity, he will compromise the business, or submit it to arbitration, but at the same time denies that he has any claim either at law or equity, this is not sufficient to take the case out of the statute *ib.*

Vide EJECTMENT, 1.

LIQUIDATED DAMAGES

Vide AGREEMENT, 3.

LIS PENDENS.

Notice of, *vide* FRAUDULENT SALES
AND CONVEYANCES, 3.

M.

MASTERS AND OWNERS OF VESSELS.

1. Where a contract was entered into for the sale of a vessel, the possession of which was taken immediately, but it was agreed that a bill of sale was not to be given until the whole of the purchase money was paid, and, in the mean time, the register stood in the name of the original owner, who, however, exercised no control over the vessel in any respect; it was held, that he was not liable for repairs made by direction of the master, as agent for, and on the credit of the purchaser, between the time of executing the contract, and the final consummation of it, by the delivery of a bill of sale, but that the person furnishing the repairs must look to the purchaser for payment. *Leonard and M'Cartee v. Huntington and another*, 293
2. The ship's register is not evidence of the ownership of the person in whose name it stands. *ib.*

MILITARY BOUNTY LANDS.

1. In an action of ejectment brought by the heirs of *Moses Miner*, the plaintiffs claimed under a patent issued to *Moses Miner*, a soldier in the *New-York* line, during the revolutionary war; it was held, that the patent was *prima facie* evidence of the service of the soldier mentioned in it, and as it did not appear that there was any man in the army by the name of *Minner*, the

variance must be considered a mere misspelling of the name, which could not affect the identity of the person, and did not make it a distinct name; and, besides, the defendant claimed under a soldier by the name of *Moses Miner*, who, there was strong evidence to show, was the same as the person under whom the lessors claimed. *Jackson, ex dem. Miner, v. Bouckam*, 226

- 2 Where an officer in the *New-York* line, during the revolutionary war, died in 1781, having devised all his real and personal estate to his father, and in 1793, a patent was issued to the testator for a military lot, and after the death of the father, the only brother of the testator, in 1811, entered upon the lot, and in 1814 conveyed part of it to A., under whom the defendant claimed; it was held, that the title to the lot was vested in the testator at the time of his death, and that he might devise it; that his father was entitled to it, both as the devisee and as the heir of his son, and having conveyed it in 1794, the lessors of the plaintiff, who claimed under that conveyance, were entitled to recover it in an action of ejectment against the defendant, claiming under the conveyance from the testator's brother. *Smith, ex dem. Roosevelt and others, v. Van Deursen*, 343

MILL AND MILL-SEAT.

Vide ACTION ON THE CASE, 4.

MONTH.

Vide BILLS OF EXCHANGE AND PROMISSORY NOTES, 1. 5. MORTGAGE, 1.

MORTGAGE.

1. The public notice required to be given in cases of sales under power 493

- ers in mortgages (sess. 36. c. 32. s. 6. 1 *N. H. L.* 374.) is sufficient, if published for six successive lunar months previous to the time of sale. *Loring v. Halling*, 119
2. Where land is conveyed absolutely, and the grantee, by a separate instrument or defeasance, covenants to reconvey to the grantor on his paying a certain sum of money, the transaction amounts only to a mortgage. *Peterson v. Clark*, 205
 3. A mortgagee cannot maintain an action of waste against the mortgagor, at least until after a forfeiture of the mortgage. *ib.*
 4. And he has no property in trees cut down by the mortgagor, so as to maintain trover against him. *ib.*
 5. The land of *A.* was sold under an execution at the suit of *B.* against *A.* on the 1st of *March*; on the 10th, a mortgagee of the same land filed a bill of foreclosure in chancery against *A.* and *B.*, and on the 19th, the sheriff executed a deed to the purchaser under the execution: Held, that the deed relates back to the time of the sale, and the purchaser is not precluded from contesting the validity of the mortgage in an action in ejectment at law, he not being a party to the bill, and as his title was acquired previous to notice of a *lis pendens* in chancery, although not consummated until afterwards. *Jackson, ex dem. Noah, v. Dickenson and Thompson*, 309
 6. Where a person, seised of land in fee, mortgages it, and afterwards marries, his widow, on his death, is entitled to dower out of the equity of redemption. *Coles v. Coles*, 319
 7. A mortgage at law, as well as in equity, is a mere security for money; the mortgagee has only a chattel interest, and the freehold remains in the mortgagor. *S. C.* Per *Spencer, J.* 320
 8. Where land is conveyed to the husband during coverture, who, at the same time, executes a mortgage to the grantor to secure the consideration money, the seisin of the land is but for an instant in the grantee, and is immediately re-vested in the grantor; and, consequently, the widow of the grantee cannot claim her dower in the premises. *Stow v. Tift*, 458
 9. Where a conveyance of land, and a mortgage to secure the purchase money, are executed at the same time, they are to be taken in connection as forming parts of the same agreement, and the effect of the transaction is, that if the price of the land shall not be paid at the stipulated time, the grantor shall be re-seised of the land free of the mortgage; and whether such an agreement be contained in one and the same instrument, as it well may be, or in distinct instruments, can make no difference as to the effect. *ib.*
 10. The preference of a mortgage, given by the purchaser of lands sold and conveyed at the same time, to secure the payment of the purchase money, to any previous judgment which may have been obtained against the purchaser, is not restricted to the case of a mortgage to the vendor of the land, there being no restriction in the words of the statute concerning mortgages, (sess. 36. c. 32. s. 15.) by which this preference is created; and, therefore, if the purchase money be advanced by a third person, to whom the purchaser, at the same time that the conveyance is executed to him, executes a mortgage of the same land, to secure the money advanced, such mortgage is entitled to the same preference over a prior judgment, as the vendor of land would have had, had the mortgage been executed to him. *Jackson, ex dem. Bebee, v. Austin*, 477
 11. A deed purporting to be an absolute conveyance of land, but in fact intended as a security for a debt, is a mortgage. *Dunkam v. Dey*, 555

12. A party cannot obtain relief in equity against a mortgage given for a usurious debt, without offering to redeem on payment of the principal and legal interest. *ib.*
 13. Where a mortgage is given as security for the payment of promissory notes, which are from time to time renewed, the renewal is not to be deemed an extinguishment of the original debt, so as to affect the continuance of the security. *ib.*
 14. A person who takes a conveyance of land, with notice of a prior unregistered mortgage, is not a *bona fide* purchaser, who can gain a priority by having his deed first recorded. *ib.*
 15. Where a person conveyed all his property, real and personal, without any particular description in the body of the deed, but in a schedule annexed, certain lots previously mortgaged by the grantor to *D. D.* were described, as "lots of ground in *Stuart* street, the title to which is in *D. D.*," it was held, that this was notice to the grantee of the prior mortgage to *D. D.*, which had never been recorded, and that, therefore, the grantee could not, by having his deed first recorded, obtain a priority. *ib.*
- some interested person*, the verdict was held to be uncertain, and a new trial was granted. *Jackson, ex dem. Malin, v. Malin*, 293
 3. Where the defendant is apprized of a material witness, whose appearance he cannot procure in time, he ought to apply to the judge to postpone the trial; and if he goes to trial without the testimony of the witness, and a verdict is found against him, the Court will not grant a new trial for the purpose of letting in the evidence of the witness. *ib.*
 4. A motion for a new trial must be within the first four days of the term, and before judgment is perfected, unless an order to stay proceedings on the verdict has been obtained, which operates as an enlargement of the rule of four days. *Jackson, ex dem. Colden and others, v. Chase*, 354
 5. It can in no case be made after a judgment has been regularly perfected; although it be on the ground of evidence newly discovered since the trial. *ib.*
 6. Where a justice of the peace tried an action for an assault and battery, and gave judgment for the plaintiff for 15 dollars, and issued execution thereon, under which the constable levied on and sold a pair of horses, wagon and harness; in an action of *trespass* by the defendant against the justice and constable, in which he obtained a verdict for 270 dollars, the Court refused to grant a new trial, although there was reason to believe that the justice had not acted maliciously, but under a mistake as to the extent of his jurisdiction, and there were strong circumstances to show that the party himself had, through his agent, purchased the goods under the execution, at a price about equal to the amount of the judgment against him, so that he could have sustained no greater injury than the amount of the judgment: but still the case admitted of doubt, and the question

N.

NEW TRIAL.

1. A new trial will not be granted for the purpose of letting in cumulative evidence as to matter which was principally controverted on the former trial. *Pike v. Evans*, 210
2. Where the judge directed the jury to declare by their verdict, whether a will had been altered after its execution, and, if so, by whom, and they declared by their verdict that the will had been altered by

was fairly submitted to the jury.
Woodard v. Paine and Lake, 493

be recovered on the value of the
goods. *ib*

NON COMPOS MENTIS.

Vide AGREEMENT, 5.

NON-INTERCOURSE.

1. Goods shipped contrary to the non-intercourse law of the *United States*, were forfeited immediately, and the owner's property devested by the act of shipment. *Amory and others v. McGregor*, 24
2. But goods shipped in *Great Britain* after the declaration of war, were not forfeited by the non-intercourse act, which was virtually repealed by the declaration of war. *ib*.
3. Where goods were shipped in *Great Britain*, after the declaration of war, to be sent to the *United States*, on account of an *American* citizen, and the agent of the charterer of the ship procured the vessel and cargo to be captured as prize of war by a *British* cruiser, and libelled in the Vice-Admiralty Court in *New-Providence*, and the cargo, of which the goods in question were part, was claimed by the agent of the charterer, and various other persons, who in their petitions alleged that if it were transported to the *United States*, it would be forfeited under the non-intercourse law; it was held, that the goods were lost by the act of the defendant, the charterer of the vessel, who was liable on the bill of lading; the shipment, under the circumstances, not being illegal, as a trade with an enemy, and if the non-intercourse act were still to be deemed in force, there could be no doubt that the forfeiture would have been remitted, under the act of Congress of *January 2d*, 1813; but as the defendant had not acted fraudulently, interest was not allowed to
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NOTICE.

Vide FRAUDULENT SALES AND CONVEYANCES, 3.

Wherever magistrates proceed judicially, both the parties to the proceedings are entitled to be heard, and notice to both is indispensably requisite, notwithstanding there is no direction in the act, by which the tribunal is constituted, that notice shall be given. *Commissioners &c. of Kinderhook v. Claw and another*, 537

O.

OFFICER.

Action against, for negligence, *vide*
ACTION ON THE CASE, 5, 6, 7.

OVERSEERS OF HIGHWAYS.

**Vide* ACTION ON THE CASE, 5, 6, 7.

OVERSEERS OF THE POOR.

Vide ASSUMPSIT, 3

P.

PARTITION

1. Where the husband was seised of the land in severalty, the widow cannot proceed under the act for the partition of lands, sess. 36. c

- 100.** (1 *N. R. L.* 537.) for the purpose of obtaining her dower; nor can she be made a party to a partition among the heirs, devisees or grantees of her husband. *Coles v. Coles*, 319
- 2.** But it seems, that where the husband was seised as joint tenant, or tenant in common of land, the widow, as her right of dower extends only to an undivided part, is a proper party to a partition among the several joint owners. *ib.*

PARTNERSHIP.

- 1.** A partnership between persons residing in two different countries for commercial purposes, is at least suspended, if not *ipso facto* determined, by the breaking out of war between those countries; as the effect of a state of war is to render illegal all intercourse between the subjects and citizens of the hostile nations. *Griswold v. Waddington*, 57
- 2.** If such partnership expire by its own limitation during the war, the existence of the war dispenses with the necessity of giving public notice of the dissolution. *ib.*
- 3.** The death, insanity, or bankruptcy of a partner, works a dissolution of the partnership. *ib.*
- 4.** Either partner may, by his own act, dissolve a partnership, unless restrained to continue it for a definite period, by compact. *ib.*
- 5.** Where real estate is held by partners, for the purposes of the partnership, they do not hold it as partners, but as tenants in common, and the rules relative to partnership property do not apply in regard to it; therefore, one partner can only sell his individual interest in the land, and when both partners join in a sale and conveyance, and one only receives the purchase money, the other partner may maintain an action against him for his proportion. *Coles v. Coles*, 159
- 6.** *A.* and *B.*, citizens of the *United States*, having been in partnership in *France*, agreed, in *September*, 1806, to dissolve that partnership, and that *B.* should establish himself in *New-York*, *A.* remaining in *France*; that they should exert themselves to procure consignments from the *United States*; that *A.* should ship goods to *B.*, the amount of which, and such sum as *B.* could procure by association, loan or credit, were to be converted into reasonable advances on goods consigned to *A.*; that on shipments made by *A.* to the *United States*, by order of *B.*, *B.* should receive one third of the profits, and on shipments by *B.* to *France*, *A.* should receive one third of the profits, and that *B.* should have one third of the commissions or consignments from the *United States* to *A.*; that a statement of their respective accounts was to be made at the end of each year; and that if one of the parties had incurred losses, the other was not to be answerable for them beyond a forfeiture of the profits of the year. According to this agreement, *B.* established himself as a merchant in *New-York*, and having contracted debts in relation to his business: Held, in an action against *A.* and *B.*, that by this agreement they were partners, there being a community of profit and loss; that as the debt, being principally for money lent, had relation to the partnership concerns, the plaintiff was entitled to recover; and that it was not necessary for him to show that the money lent or credit given was used for the benefit of the partnership; and that the stipulation limiting the extent of the liability of each of the partners for losses incurred by the other, although valid between themselves, could not affect other persons. *Wallen and Wallen v. Sherburne and Eakin*, 409
- 7.** Where one of two partners executes a bond for duties on goods imported,

with a surety, and the surety advances his co-obligor money with which he pays the bond, he may maintain an action against both the partners for the money lent, this being a partnership transaction, although, had the surety himself taken up the bond, he could only have brought an action for money paid, against the partner who executed it. *Walden and Walden v. Sherburne and Eakin*, 409

8. An admission by one partner, after dissolution of the partnership, of a balance due from the firm, does not bind the firm; but entries made by one of the partners, during the partnership, in a book of accounts, are admissible evidence against both. *ib.*

Execution against partnership property for individual debt, *vide* EXECUTION, 4.

***Vide* ABSENT AND ABSCONDING DEBTORS, 1.**

PAYMENT.

1. An order, not negotiable, for the payment of money, and which has not been paid or accepted by the drawee, is not a payment or extinguishment of a precedent debt. *Hoar v. Clute*, 224
2. Where, on the sale of goods, the vendee delivers to the vendor the promissory note of a third person, which he refuses to endorse, it is to be considered as payment, and the vendor cannot afterwards resort to the vendee, unless the note was forged, or there was fraud or misrepresentation on his part as to the solvency of the maker. *Breed v. Cook and Cadwell*, 241
3. To the common counts in *assumpsit*, a plea, that after making the promises in these counts mentioned, the defendant made and delivered to

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the plaintiff his promissory note for the same identical promises, which the plaintiff received in full satisfaction, and afterwards endorsed and delivered the note to A. B., is bad; for the receiving of a promissory note, and endorsing it to a third person, does not extinguish the original cause of action, provided the payee can show it to be lost, or can produce it on the trial to be cancelled. *Lurdick v. Green*, 247

4. A negotiable note does not extinguish an antecedent debt which formed the consideration of it, except *sub modo*. *ib.*
5. Where the vendor of goods is induced to take the promissory note of a third person as payment, by a fraudulent representation of the solvency of that person, the note is no satisfaction, and he may maintain an action against the purchaser for the price of the goods. *Pierce and Pierce v. Drake*, 475

PERFORMANCE.

***Vide* AGREEMENT, 3. 4.**

PLEADING.

- I. *Parties to the action.*
- II. *Declaration.*
- III. *Plea.*
- IV. *Replication and subsequent pleadings.*
- V. *Demurrer.*
- VI. *Pleading in particular actions and cases.*
- VII. *Variance.*
- VIII. *Verdict.*

I. *Parties to the action.*

1. A husband cannot be sued for a debt contracted by his wife *dum sola*, without her being joined as defendant, the cause of action sur-

- living against her; and the non-joinder of the wife is a sufficient ground for arresting or reversing the judgment. *Gage v. Reed and another*, 403
2. Where an attorney, having a lien for his costs, on a judgment recovered by his client for nominal damages and costs, or an assignee, having an equitable interest in the judgment, takes out a *ca. sa.*, and the sheriff, having arrested the defendant, suffers him to escape, the party beneficially interested may maintain an action against the sheriff for the escape, in the name of the plaintiff in the original suit. *Martin v. Hawks*, 405
3. Whether overseers of the poor can sue, or be sued, in their private capacity, for their own official acts, or those of their predecessors? *Quære. Overseers of Pittstown v. Overseers of Plattsburgh*, 438
4. In an action for rent, or any other cause, accruing before marriage, in regard to the real estate of the wife, she must be joined with her husband; but for rent of her land, arising after marriage, she need not be joined. *Decker v. Livingston and others*, 479
5. Where the husband distrains and avows for rent arising from the land of his wife, without joining her in the proceedings, he must show, affirmatively, that the rent accrued after the marriage, for this cannot be intended; and if that fact be not shown, the objection may be taken at the trial. *ib.*
6. In an action of trespass brought by tenants in common in relation to their land, or in debt for rent arising out of land, or in any other action merely personal, they must all join as plaintiffs. *ib.*
7. But in a distress and avowry for rent, which savor of the realty, tenants in common ought not to join. *ib.*
9. Where a husband and wife execute a conveyance, in which they both covenant to the grantee, as the wife is not bound by the covenant, she cannot be joined with her husband in an action for a breach of it. *Whitbeck v. Cook and Wife*, 483
9. Where husband and wife are improperly joined as defendants, in an action, it seems, that if the plaintiff has a cause of action against the husband, he will be allowed to enter a *noli prosequi* as to the wife. *ib.*
- ### II. Declaration.
10. The want of an averment is cured by verdict. *Duffie v. Hayes*, 327
11. After verdict, it will be intended, that an omission in the declaration was supplied by proof. *Bartlett v. Crozier*, 259
- Declaration in case against overseer of highways, *vide ACTION ON THE CASE*, 7.
- Declaration in action under the act to prevent gaming, *vide ACTION ON STATUTE*.
- Declaration on contract of indemnity, *vide ASSUMPSIT*, 4.
- Assigning breaches in covenant, *vide COVENANT*, 1, 2.
- Time to declare, *vide PRACTICE*, II. 3
- Judgment of *non pros.*, *vide PRACTICE*, III. 3.
- ### III. Plea.
12. The defendant, by pleading the general issue, admits the character in which the plaintiff sues. *Carpenter and Rose v. Whitman and another*, 228

13. A plea by an executor, stating that he had not, on the day of exhibiting the plaintiff's bill, nor any time since, had any goods or chattels which were of the testator at the time of his death, in his hands, to be administered, without alleging, that he had fully administered the goods and chattels which were of the testator at the time of his death, and which had come to the hands of the defendant to be administered, and without alleging that he never had any goods or chattels of the testator in his hands to be administered, is good, both in form and substance. *Fowler v. Sharp and another*, 328

14. And the exhibition of the bill mentioned in the plea, is tantamount to the commencement of the suit, or suing out the writ, and will be so regarded, unless the plea is specially demurred to on that ground. *ib.*

15. In an action of *assumpsit*, where the declaration sets forth an agreement to answer for the debt, default, or miscarriage of a third person, the defendant may plead the statute of frauds specially in bar. *Myers and Bellinger v. Morse*, 425

Plea of duress, *vide* BOND.

IV. Replication and subsequent pleadings.

16. Where, in an action of trespass, the defendant, under the *act for the more easy pleading in certain suits*, (sess. 24. c. 47. s. 2. 1 N. R. L. 155.) pleads that the supposed trespass was done by authority of a statute of this state, without expressing any other matter or circumstance contained in such statute, the plaintiff must reply *de injuria sua propria*, concluding to the country; and a special replication concluding with an averment is bad. *Comley v. Lockwood and others*, 188

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V. Demurrer.

17. Where, on a demurrer to a subsequent pleading, a party goes back to take advantage of a defect in a previous pleading, he can object only to such defects as are grounds of general demurrer. Per *Thompson, Ch. J. Comley v. Lockwood and others*, 191

VI. Pleading in particular actions and cases.

18. In an action on a promissory note given for the price of a chattel, the defendant may, under the general issue, show deceit in the sale. *Sill v. Rood*, 230

19. In an action of *assumpsit*, where the declaration sets forth an agreement to answer for the debt, default or miscarriage of a third person, the defendant may plead the statute of frauds specially in bar. *Myers and Bellinger v. Morse*, 425

20. In assigning a breach of a covenant for quiet enjoyment, contained in a conveyance of land, the plaintiff must show an entry, and expulsion from, or some actual disturbance in the possession. *Whitbeck v. Cook and Wife*, 483

Plea in an action for not returning writ, *vide* EXECUTION, 11.

Special plea in *ASSUMPSIT*, *vide* PAYMENT, 3.

Plene administravit, *vide* ante, III. 13.

VII. Variance.

21. A variance between the declaration and proof must be objected to at the trial, and if not done then, the party cannot afterwards avail himself of it. *Pike v. Evans*, 210

VIII. Verdict.

22. In actions for torts against several, although they join in the plea of not guilty, one may be found guilty, and the others not guilty. *Van Deursen v. Van Slyck and Wife*, 224

POOR.

1. In order of maintenance, legally made, cannot afterwards be vacated by two other justices. *Carpenter and Rose v. Whitman and another*, 208
2. Where a person has, at the request of an overseer of the poor, and on his promise that he would see him paid, boarded a pauper, and furnished him with necessaries, he may maintain an action of *assumpsit* against the overseer, although no order had ever been made for the relief of the pauper. *King v. Butler*, 281
3. A., the owner of an infirm slave, executed a bill of sale of the slave to B., a person who was unable to maintain her at the same time paying him for y dollars to take her off his hands. B. then sold the slave, and, after several sales, she finally came into the hands of C., who lived out of the state. The sales were all fair and *bona fide*. A. resided in Claverack, and after the sale to C., the slave was left in the town of Claverack, and wandered into the city of Hudson, from whence she was removed, by an order of two justices, to the town of Claverack. Held, that the sale from A. to B might be deemed collusive and void within the 14th section of the act concerning slaves and servants, (2 N. R. L. 206.) at the election of the justices, who might consider either A. as the master of the slave, or C., although he lived out of the state, there being no evidence that he had exported, or attempted to export, the slave; and, therefore, the order was proper

on both grounds; on the first, because Claverack was the place of settlement of A.; and on the other, because, if C. was the master, as he had no place of settlement within the state, and the slave had wandered from town to town, the justices were authorized, by the 33d section of the act for the relief and settlement of the poor, (1 N. R. L. 292.) to remove the slave to the place from whence she last came. *Overseers of Claverack v. Overseers of Hudson*, 283

4. On an appeal from an order of removal, the Court of Sessions ought not to compel one of the overseers of the poor, who is a party to the appeal, to testify; but this is, notwithstanding, not a ground for reversing their order, as the proceedings were not before a jury, and this Court will reject the evidence improperly given. *Overseers of Plattekill v. Overseers of New Paltz*, 305
5. Where a person occupied and cultivated land on shares, and in one year delivered to the owner, as his proportion of the crop, produce to the value of more than thirty dollars, but every other year, the share received by the owner was less than thirty dollars, it was held, that this was not such a renting and occupation of a tenement, of the yearly value of thirty dollars, for two years, and actual payment of rent, as to gain the occupant a settlement in the town in which the land was situated, under the 2d section of the act for the relief and settlement of the poor, (sess. 36. c. 78. 1 N. R. L. 279.) id.
6. The overseers of the poor of the town of Plattsburgh, in the county of Clinton, obtained an order of two justices of that county, adjudicating the legal settlement of a pauper to be in Pittstown, in the county of Rensselaer, and ordering his removal thither, and he was accordingly removed to Pittstown. The pauper had no legal settlement in

tais state. The overseers of the poor of *Pittstown* appealed to the Court of General Sessions of the Peace of the county of *Clinton*, who quashed the order of removal; but the overseers of the poor of the town of *Plattsburgh* refused to remove the pauper back to *Plattsburgh*, or provide for him, or maintain him at *Pittstown*, he being sick and unable to be removed, and he had, subsequently to the reversal of the order, been maintained by the overseers of *Pittstown*, who brought an action on the case against the overseers of *Plattsburgh*, to recover their expenses, &c., and set forth the above facts in their declaration. Held, on a demurrer to a special plea of the defendants, that the action was maintainable, on the principle, that a burthen had been unjustly thrown upon *Pittstown*, by the procurement of the overseers of the poor of *Plattsburgh*, and as the pauper had no legal settlement in this state, it was their duty to exonerate the overseers of *Pittstown* from the burthen which they had cast upon them. But whether the plaintiffs and defendants could sue, or be sued, in their private capacity, for their own official acts, or those of their predecessors? *Quere. Overseers of Pittstown v. Overseers of Plattsburgh*, 436

POWER.

The testator directed, that in case of a deficiency of his personal estate, some of his real estate should be sold for the payment of his debts; he then devised his real and personal estate to his wife for life, and appointed her and another person his executors. The widow alone undertook the execution of the will; and the testator having disposed of all his personal property in his lifetime, and dying indebted, the executrix sold and conveyed part of the real estate: Held, that

the power was well executed by the executrix alone. *Jackson, ex dem. Hunt, v. Ferris*, 346

PRACTICE.

- I. *Affidavits.*
- II. *Practice relative to the declaration and pleadings.*
- III. *Default, assessment of damages, and writ of inquiry.*
- IV. *Judgment as in case of nonsuit.*
- V. *Trial and inquest.*
- VI. *Motions, arguments, cases, and notices of motion.*

I. *Affidavits.*

1. An affidavit taken before a commissioner, or recorder, who is counsel in the cause, may be read but not if he is the attorney. *Ward v. Judd*, 531

II. *Practice relative to the declaration and pleadings.*

2. The plaintiff in the bill of particulars of his demand, is not obliged to state the credits or payments made by the defendant. *Ryckman and another v. Haight*, 222
3. Where a rule is entered, for the plaintiff to declare before the end of the next term, the plaintiff has the whole of the last day of the term in which to declare; and his default cannot be entered until the next day thereafter. *Sharp v. Dorr*, 531

III. *Default, assessment of damages, and writ of inquiry.*

4. A writ of inquiry of damages cannot be executed on a *Sunday*; nor can the jury, who have been impanelled on *Saturday*, and heard the allegations and proofs of the parties before 12 o'clock at night,

assess the damages, and deliver their verdict to the sheriff on *Sunday*. *Butler v. Kelsey*, 177

5. If the plaintiff has any objections to any of the jurors, he must make them openly; and if he state them privately to the sheriff, who, thereupon, discharges a juror, the inquiry will be set aside. *ib.*
6. Where the plaintiff, after obtaining an interlocutory judgment, neglected to proceed farther for more than two terms, a rule was granted, on motion of the defendant, that the plaintiff execute his writ of inquiry in 30 days, or be non-prossed. *Kent v. M'Donald*, 400

IV. Judgment as in case of nonsuit.

7. Where there is an issue in law, and an issue in fact, the defendant cannot, whilst the issue in law remains undetermined, move for judgment as in case of nonsuit. *Overseers of Pittstown v. Overseers of Plattsburgh*, 393

V. Trial and inquest.

8. Where the plaintiff is apprized of a material witness, whose appearance he cannot procure in time, he ought to apply to the judge to postpone the trial; and if he goes to trial without the testimony of the witness, and a verdict is found against him, the Court will not grant a new trial for the purpose of letting in the evidence of the witness. *Jackson, ex dem. Malin, v. Malin*, 299
9. If a defendant, living within 40 miles of the place of trial, changes his residence permanently to a place beyond that distance, before issue is joined in the cause, he will be entitled to *fourteen* days' notice of trial; but if he change his residence after issue joined, he is entitled only to *eight* days' notice. *Jenks and others v. Payne*, 390

10. Where a cause is noticed for trial, and as an inquest, a copy of the affidavit of defence filed with the clerk of the sittings, must be served on the plaintiff's attorney, otherwise the defendant must pay costs, in case the inquest taken by default is afterwards set aside. *Baker v. Ashley*, 536

VI. Motions, arguments, cases, and notices of motion.

11. The rule of practice as to cases does not apply to bills of exceptions; and an order to stay proceedings is unnecessary, or it may be granted of course. *Hasbrouck v. Tappan*, 182
12. An objection not taken at the trial cannot be raised on the argument of the case at bar. *Suckley v. Furse*, 338
13. Where there is an issue in law, and an issue in fact, it is most proper that the issue in law be first determined; but the plaintiff has his election which shall be first tried; and the defendant is not entitled to judgment, as in case of nonsuit, for not proceeding to the trial of the issue in fact, while the issue in law remains undetermined. *Overseers of Pittstown v. Overseers of Plattsburgh*, 393
14. Where a verdict is taken subject to the opinion of the Court, the Court may draw the same conclusions from the evidence as the jury ought to have done. *Walden and Walden v. Sherburne and Eakin*, 409

Vide Costs, 1, 2.

PRESCRIPTION.

Vide ACTION ON THE CASE, 4.

PRISONER.

1. Where a defendant taken in execution is discharged from imprisonment, 503

onment under the act for the relief of debtors with respect to the imprisonment of their persons, and is afterwards sued upon the original judgment, he must, if he intend to avail himself of his exemption from imprisonment, plead it; and his omission to plead it is a waiver of his privilege; and if imprisoned again on another execution, in a suit founded on the original judgment, his discharge is no justification in an action against the sheriff for an escape; and even if such subsequent execution were voidable, the sheriff cannot avail himself of the error. *Cable v. Cooper*, 152

2. It seems that the *habeas corpus* act does not apply to cases of imprisonment on civil process. *ib.*

3. But where a defendant in execution is discharged from imprisonment, under the act for the relief, &c., and is again imprisoned on an execution issued in a suit founded on the original judgment, a judge or commissioner has no authority to discharge him under the *habeas corpus* act, and a discharge granted under such circumstances is no protection to the sheriff, in an action for an escape. *ib.*

4. If the defendant be convicted of perjury in procuring his discharge, he is, notwithstanding his discharge, liable to be again imprisoned, either on the old judgment, or under a new judgment recovered upon the old one, in an action of debt: and if the discharge be pleaded, the plaintiff may reply to it such conviction, which will be conclusive to bar him of his exemption. *S. C. Per Van Ness, J.* 155

5. The second judgment being regular both in form and substance, authorized the execution issued upon it, and is a complete justification to the sheriff in an action for false imprisonment. *S. C. Per Van Ness, J.* *ib.*

Vide COURTS OF JUSTICES OF THE PEACE, VII. 16.

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PRIVILEGE OF ATTORNEY AND COUNSEL.

Vide ATTORNEY, 1.

PRIZE.

1. *American* goods were captured by the *British*, and carried into *Futa*, a *Swedish* island, but then in the possession of the *British*, and completely under their control, *Sweden* at that time being at war with *Great Britain*; the goods, while at *Futa*, were proceeded against as prize in the Court of Admiralty in *England*, and pending the proceedings, peace was concluded between *Great Britain* and *Sweden*, and the goods were afterwards condemned without ever having been in *Great Britain*. Held, that the condemnation was legal, and divested the property of the original owners. *Page and others v. Lenox and Maitland*, 172
2. Whether a Court of Admiralty sitting in one country can adjudicate upon property captured as prize of war, and taken into a neutral territory, and never coming within the jurisdiction of the Court. *Quære.* *ib.*
3. But it may adjudicate upon a prize carried into the ports of an ally in the war. *ib.*

PROMISSORY NOTE.

Vide BILLS OF EXCHANGE AND PROMISSORY NOTES.

Q.

QUO WARRANTO INFORMATION.

1. An information in the nature of a *quo warranto* lies against an in-

corporated company, for carrying on banking operations without authority from the legislature. *The People v. The Utica Insurance Company*, 358

2. Privileges and immunities of a public nature, which cannot legally be exercised without a legislative grant, are franchises, although they never existed in the people, or could be exercised by them in their political capacity. *ib.*

3. Since the *act to restrain unincorporated banking associations*, April, 1804, (sess. 27. c. 117, re-enacted April 6th, 1813, sess. 36. c. 71. 2 N. R. L. 234.) the right or privilege of carrying on banking operations, by an association or company, is a franchise, which can only be exercised under a legislative grant. *ib.*

4. An information in the nature of a *quo warranto*, for usurping a franchise, need show no title in the people to the franchise, but it lies with the defendant to show his warrant for exercising it. *ib.*

5. The *act to incorporate the Utica Insurance Company*, passed March 29th, 1816, (sess. 39. c. 52.) does not authorize the company to institute a bank, issue bills, discount notes, and receive deposits, such powers not being expressly granted by the legislature, and not being within their intention, as collected from the act of incorporation; and the company having assumed and exercised those powers, they were held to have usurped a franchise; and on an information in the nature of a *quo warranto* being filed by the attorney-general, judgment of ouster was rendered against them. *ib.*

R.

RANSOM.

Vide AGREEMENT, 1, 2.

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RECEIPT.

Vide EVIDENCE, V. 14

REGISTER.

Vide EVIDENCE, II.

RELATION.

The land of *A.* was sold under an execution at the suit of *B.* against *A.* on the first of *March*; on the 10th, a mortgagee of the same land filed a bill of foreclosure in chancery against *A.* and *B.*, and on the 19th, the sheriff executed a deed to the purchaser under the execution; Held, that the deed relates back to the time of the sale, and the purchaser is not precluded from contesting the validity of the mortgage in an action of ejectment at law, he not being a party to the bill, and as his title was acquired previous to notice of a *lis pendens* in chancery, although not consummated until afterwards. *Jackson, ex dem. Noah, v. Dickenson and Thompson*, 309

RELEASE.

In debt for rent by tenants in common, a release by one is a bar to the action; but in a distress and avowry for rent, a release by one is not a discharge as to the others. *Decker v. Livingston and others*, 479

Fraudulent release, *vide* ATTORNEY, 2.

RENT.

1. In debt for rent arising out of land, tenants in common must all join as plaintiffs, and a release of the action by one of them is a bar to the others. *Decker v. Livingston and others*, 479
2. But in a distress and avowry for rent, which savor of the realty tenants in common ought not to

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join; and, therefore, if one releases the rent, it is not a discharge as to the others. *Decker v. Livingston and others*, 479

3. One tenant in common may, however, before distress and avowry, receive the whole rent, and discharge the lessee; for until distress and avowry, the rent is only in the personality. *ib.*
4. A receipt for rent arising at a subsequent period, is presumptive evidence that all rent previously accruing had been paid. *ib.*
5. Where there is a lease at a certain annual rent, and the tenant holds over after the expiration of the lease, without any new agreement as to the rent, the law implies that the tenant holds from year to year, at the original rent. *Abel and Abel v. Radcliff*, 505
6. But if the rent reserved in the lease was merely a ground rent, or for the land exclusive of the buildings, and the landlord, at the expiration of the term, becomes entitled to the buildings erected by the tenant, as well as the land, in that case a different rule will be adopted, and the annual value of both the land and buildings is the measure of damages. *ib.*

REPLEVIN.

1. Replevin will not lie against an officer, who, having levied upon, and taken goods in execution, receives from the defendant the amount due on the execution, and then refuses to re-deliver the goods. *Gardner v. Campbell*, 401
2. Where the husband distrains and avows for rent arising from the land of the wife, without joining her in the proceedings, he must show affirmatively that the rent accrued after the marriage, for this cannot be intended; and if that fact be not shown, the objection may be taken at the trial. *Decker v. Livingston and others*, 479

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S.

SALE OF CHATTELS.

1. Where a debtor confesses judgment, and afterwards fraudulently purchases, and procures to be delivered, goods, without paying for them, with intention to subject them to the execution of the judgment creditor, the title to the goods does not become vested in the purchaser, and they, therefore, cannot be taken on an execution against him. *Van Cleaf and others v. Flect*, 147
2. In an action on a promissory note given for the price of a chattel, the defendant may, under the general issue, show deceit in the sale. *Sill v. Rood*, 230
3. A promissory note given on the sale of a chattel, fraudulently represented by the seller to be of great value, when in fact it was of no value, is without consideration, and void. *ib.*
4. Where, after a sale of goods, some act remains to be done by the vendor before delivery, the property does not vest in the vendee, but continues at the risk of the vendor. *M'Donald v. Hewett*, 349

SHERIFF.

1. A deputy sheriff, having a *fi. fa.* in his hands, agrees with the defendant in the execution to delay the sale, and to join with the defendant in making a note, on which money should be raised and applied to the satisfaction of the judgment, provided that he should still retain the execution in his hands, and if he was called on for payment of the note, might then proceed to sell for his own indemnity. The note is, accordingly, made, the money raised, and paid over to the agent for the creditor's attorney, in satisfac

tion of the judgment, the officer, at the time, informing the agent that the execution was still to be kept in life for his own indemnity. The officer, being afterwards called upon for payment of the note, sells the defendant's property under the execution. Held, that the payment to the judgment creditor, not being a conditional payment, was a satisfaction of the judgment, and, therefore, the execution was spent, and could not be used by the officer to enforce his own agreement with the debtor, such agreement also being illegal, and tending to oppression and abuse; and that the defendant in the execution might maintain an action of trespass against the officer for the property taken and sold by him. *Sherman v. Boyce*, 443

2. An action on the case will lie against a sheriff for not returning an execution, or the party may proceed by attachment, at his election. *Burk v. Campbell*, 456

3. In an action on the case against a sheriff for not levying and returning a writ of *fi. fa.*, a plea that the sheriff had never been ruled to return the writ, is bad, for the sheriff is bound to return a writ without being ruled, and he cannot avail himself of his own neglect of duty to defeat the plaintiff's action. *ib.*

Venue in action against, *vide* ACTION, 3.

Distinction between acts done *colore officii* and *virtute officii*, *vide* ACTION, 4.

Bond to sheriff, *vide* BOND, 2.

Vide ESCAPE.

SHIP.

Vide EVIDENCE, II. 6. FREIGHT AND CHARTER-PARTY. MASTERS AND OWNERS OF VESSELS.

SLAVE.

Vide POOR, 3.

STATUTES.

1. The preamble of a statute may be referred to, to explain the enacting part, when it is doubtful, but not to restrain its meaning when clear and unambiguous. *Jackson, ex dem. Woodruff and others, v. Gilchrist*, 89
2. The word *month*, when used in a statute, is, if nothing appear to the contrary, to be understood a lunar, and not a calendar, month. *Loring v. Halling*, 119
3. Where the words of a statute are obscure, or doubtful, the intention of the legislature is to be resorted to, in order to discover their meaning. *The People v. The Utica Insurance Co.* 359
4. A thing within the intention is as much within the statute as if it were within the letter; and a thing within the letter is not within the statute, if contrary to the intention of it. *ib.*
5. Such construction ought to be given as will not suffer the statute to be eluded. *ib.*
6. A statute restraining any *person* from doing certain acts, applies equally to corporations, or bodies politic, although not mentioned. *ib.*

Vide CORPORATION.

STATUTES CONSTRUED, EXPLAINED, OR CITED.

- 1787, Feb. 26. Sess. 10. c. 44. (Frauds,) 425. 503
- 1788, Feb. 6. Sess. 11. c. 11. (Quo Warranto Informations,) 386
- 1801, March 21. Sess. 24. c. 46. (Gaming,) 5
- , —, —, Sess. 24. c. 47. (Pleading in Actions against Officers,) 188. 267

1801, March 21. Sess. 24. c. 49. (Absent and absconding Debtors,)	179	1813, April 13. Sess. 36. c. 150. (Commission Company,)	53
—, April 8. Sess. 24. c. 183. (Limitation of Action,)	3	1816, March 29. Sess. 39. c. 52. (Utica Insurance Company,)	358
1802, April 5. Sess. 25. c. 111. (Dutchess Turnpike Company,)	510	1818, April 10. Sess. 41. c. 94 (Justices' Courts,)	397
1803, April 5. Sess. 26. c. 88. (Military Lands,)	345		
1804, April 11. Sess. 27. c. 117. (Unincorporated Banks,)	358		
1805, April 9. Sess. 28. c. 99. (Mortgages,)	464		
1806, April 7. Sess. 29. c. 168. (Dower,)	23. 533		
1808, April 11. Sess. 31. c. 225. (Steam-boats,)	382		
1813, March 5. Sess. 36. c. 23. (Wills,)	348		
—, March 19. Sess. 36. c. 32. (Mortgages,)	119. 463. 477		
—, —, —, Sess. 36. c. 33. (Highways,)	254. 447		
—, —, —, Sess. 36. c. 35. (Towns. Cattle. Damage Feasant,)	220		
—, April 5. Sess. 36. c. 52. (Taxes,)	509		
—, —, —, Sess. 36. c. 53. (Justices' Courts,)	86. 196. 431. 470		
—, —, —, Sess. 36. c. 56. (Amendment of the Law. Dilatory Pleas,)	243		
—, April 6. Sess. 36. c. 67. (Sheriffs. Bail-bonds,)	259		
—, —, —, Sess. 36. c. 69. (Gaol Liberties,)	259. 474		
—, April 8. Sess. 36. c. 76. (Poor,)	282. 283. 305		
—, April 9. Sess. 36. c. 81. (Imprisoned Debtors,)	152		
—, —, —, Sess. 36. c. 88. (Slaves,)	283		
—, April 10. Sess. 36. c. 92. (Indians,)	264		
—, April 11. Sess. 36. c. 71. (Unincorporated Banks,)	358		
—, April 12. Sess. 36. c. 96. (Costs in Error,)	534		
—, —, —, Sess. 36. c. 98. (Insolvent,)	468		
—, —, —, Sess. 36. c. 100. (Partition,)	319		

STIPULATED DAMAGES.

Vide DAMAGES, 3.

STREAM OF WATER.

Vide ACTION ON THE CASE, 4.

SUPREME COURT OF UNITED STATES.

Vide ERROR, 2.

SURETY.

A surety is not discharged by the plaintiff's giving time to the principal debtor, or even by his discontinuing a suit commenced against the principal, without the privity and consent of the surety, unless the surety has explicitly required him to proceed against the principal, or the plaintiff has, by some agreement with the principal, precluded himself from suing him. *Fulton v. Matthews and Wedge*, 433

T.

TAXES.

Vide CORPORATION, 6.

TENANTS IN COMMON.

1. Where *A.* and *B.* purchased a piece of land, and divided it between them, and *A.*, being in the exclusive occupation of his part, sold it to *D.*, but both *A.* and *B.*

joined in the conveyance, it was held, that although the deed from *A.* and *B.* might be *prima facie* evidence, that they were tenants in common of the part conveyed, yet that the occupation of the land by *A.*, and *D.*'s purchasing it of him exclusively, were evidence of *A.*'s seisin of the whole. *Dolf v. Bassett*, 21

- 2 Where real estate is held by partners, for the purposes of the partnership, they do not hold as partners, but as tenants in common, and the rules relative to partnership property do not apply in regard to it; therefore, one partner can only sell his individual interest in the land, and when both partners join in a sale and conveyance, and one only receives the purchase money, the other partner may maintain an action against him for his proportion. *Cules v. Cules*, 159
3. One tenant in common of a chattel cannot maintain trespass or trover against the other, unless he destroys or sells the chattel. *Merse-reau v. Norton*, 179
4. So, where the undivided interest of one partner, in partnership property, is sold under an execution, or attachment, the sheriff and the purchaser succeed to the rights of the debtor, and the other partner cannot maintain an action against them for the seizure. *ib.*
5. In an action of trespass brought by tenants in common in relation to their land, or in debt for rent arising out of land, or in any other action merely personal, they must all join as plaintiffs, and a release of the action, by one of them, is a bar to the others. *Decker v. Livingston and others*, 479
- 6 But in a distress and avowry for rent, which savor of the realty, tenants in common ought not to join: and, therefore, if one releases the rent, it is not a discharge as to the others. *ib.*
- 7 One tenant in common may, however, before distress and avowry, re-

ceive the whole rent, and discharge the lessee, for, until distress and avowry, the rent is only in the personalty. *ib.*

Vide EJECTMENT, 4.

TITLE TO PROPERTY.

By prescription, *vide* ACTION ON THE CASE, 4. SALES OF CHATTELS, 1. 4.

TRADING WITH AN ENEMY.

Trading with an enemy's country is unlawful; but a citizen or subject of one belligerent may withdraw his property from the country of the other belligerent, provided he does it within a reasonable time after the declaration of war, and does not himself go to the enemy's country for that purpose. *Anory and others v. M'Gregor*, 24

TRESPASS.

1. Every tribunal, proceeding under special and limited powers, decides at its peril; and hence it is, that process issuing from a Court not having jurisdiction, is no protection to the Court, to the attorney, or to the party, nor even to a ministerial officer who innocently executes it. *Per Van Ness, J. Cable v. Cooper*, 157
2. Where an award settles the boundary of land, it is a justification in an action of trespass brought against the party to whom the land has been awarded, by the other party. *Sellick and Sellick v. Adams*, 197
3. Where beasts *damage feasant* have been distrained, or even impounded, the distrainer may relinquish the proceedings by distress, before satisfaction for the damage which has

been sustained, and bring an action of trespass. *Colden v. Eldred*, 220

4. In an action for trespass by cattle, it is a matter of defence, and to be shown by the defendant, that the fence which the plaintiff was bound to keep in repair was defective. *ib.*
5. A person, taking the goods of another under lawful authority, does not become a trespasser *ab initio*, by refusing to restore them, after his authority to detain the goods is determined. *Gardner v. Campbell*, 401
6. A mere non-feasance will not make a man a trespasser *ab initio*. *ib.*

Vide ABSENT AND ABSCONDDING DEBTORS, 2. ACTION, 2. COLONIAL LAWS, 3. HIGHWAYS, 1.

TROVER.

1. Where goods were put on board of the defendant's vessel, to be carried to *Albany*, and on arriving there, were, by the defendant's direction, put on the wharf, it was held that this was not a delivery to the consignee, and that the defendant was liable in an action of trover for such part of the goods as was not actually delivered to the consignee. *Ostrander v. Brown and Stafford*, 39
2. And although the goods were taken away without the direction of the consignee, by a cartman always or usually employed to transport his goods, and the greater part actually received by the consignee, this was held not to be evidence of the delivery of the part alleged to be lost, as he was not to be deemed the general agent of the consignee for receiving his goods. *ib.*
3. Where a creditor, by fraud or deception, obtains the goods of his debtor, the property is not changed, and he cannot apply them to the satisfaction of his debt, but the debtor may maintain trover against him. *Woodworth v. Kissam*, 186
- 510
4. What circumstances are sufficient to make out fraud and deception in such case, is a question to be left to the jury. *ib.*
5. A mortgagee has no property in trees cut down by a mortgagor in possession, so as to maintain trover against him. *Peterson v. Clark*, 205
6. In an action of trover, the defendant may show that the property of the goods was in a third person; or that the sale under which the plaintiff claims was made without the authority of the vendor; or that it was made in fraud of the creditors of the vendor. *Rotan v. Fletcher*, 207
7. The plaintiff and A. entered into an agreement, which stated that the plaintiff had bought of A. a certain quantity of timber, which the plaintiff was to pay for at the measurement in the city of *New-York*, when it was delivered and inspected; and also to pay the fair market price in *New-York*, when it was delivered; the plaintiff also agreed that the amount of the timber should be endorsed on notes which he held against A., and if it exceeded the amount of the notes, the plaintiff should pay the balance to A.; it was held that this agreement was executory, and did not vest the property in the timber in the plaintiff, who, therefore, could not maintain an action of trover against a third person for the conversion of it. *M'Donald v. Hewitt*, 349
8. In an action of trover brought by an officer who has levied under an execution, against parties who were engaged in a second levy on the same property, they may show circumstances of fraud to defeat the action, equally as if it had been brought by the creditor himself. *Farrington and Smith v. Sinclair*, 428
9. And to establish the fraud, evidence is admissible that the plaintiff permitted other property of the debtor

levied upon at the same time with that which is the subject of the action, to continue in his possession. *Farrington and Smith v. Caswell*, 430

10. A tortious taking is, in itself, a conversion, and no subsequent demand is necessary in order to maintain an action of trover. *Farrington and Smith v. Payne*, 431

Vide ABSENT AND ABSCONDING DEBTORS, 2. ACTION, 2.

TURNPIKE.

Where a turnpike act exempts from the payment of toll persons going to or returning from mill, with grain or flour for their family use, the exemption does not apply to a wagon going through the turnpike gate, loaded with other articles, and some grain or flour. *Bates v. Sutherland*, 510

U.

USE AND OCCUPATION.

1. Where there is a lease at a certain annual rent, and the tenant holds over after the expiration of the lease, without any new agreement as to the rent, the law implies that the tenant holds from year to year, at the original rent. *Abeel and Abeel v. Radcliff*, 505
2. But if the rent reserved in the lease was merely a ground rent, or for the land exclusive of the buildings, and the landlord, at the expiration of the term, becomes entitled to the buildings erected by the tenant, as well as the land, in that case a different rule will be adopted, and the annual value of both the land and buildings is the measure of damages. *ib.*

USURY.

1. Where a bill or note is valid, as between the drawer, or maker, and the payee, so that the latter can maintain an action upon it against the former, it is valid in the hands of an endorsee who has discounted it at a higher rate than the legal rate of interest, and he may recover the full amount of the bill or note against the maker or acceptor. *Munn v. The Commission Company*, 44
2. But the holder of a note purchased at a discount greater than the legal rate, can only recover from his endorser the sum which he actually advanced. *ib.*
3. A bill or note drawn for the purpose of being discounted, at a usurious rate of interest, and endorsed for the accommodation of the maker or drawer, is void in its original formation. *ib.*
- S. P. Bennet v. Smith and Phelps*, 355
4. Discounting a note at the rate of seven per cent. is not usurious. *Manhattan Company v. Osgood and others*, 162

UTICA INSURANCE COMPANY

Vide QUO WARRANTO INFORMATION, 5

V.

VARIANCE.

Vide PLEADING, VII.

VENIRE.

In action against sheriff, **vide ACTION, 3.**

VERDICT.

Vide AMENDMENT, 1, 2. JURY. PLEADING, VIII.

VOLUNTARY CONVEYANCE.

WRIT.

Vide FRAUDULENT SALES AND CONVEY-
ANCES, 1, 2.

Action or attachment for not returning,
vide EXECUTION, 13, 14.

W.

WRIT OF INQUIRY.

WAR.

Vide PRACTICE, III.

Vide INSURANCE, I. PARTNERSHIP.

WASTE.

WILL.

Case in the nature of, *vide* ACTION ON
THE CASE, 2, 3.

An alteration, whether material or im-
material, made in a will, by a per-
son claiming under it, renders it
void; but whether a material alter-
ation by a stranger has that effect!
Quære. Jackson, ex dem. Malin, v.
Malin, 293

WITNESS

Vide COSTS, 3. EVIDENCE, VI. VII.

END OF THE FIFTEENTH VOLUME.



